FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: MARY W. DOVE
COMMISSION SECRETARY

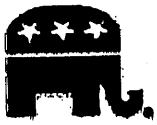
DATE: February 4, 2004

SUBJECT: COMMENTS: DRAFT AO 2003-37

Transmitted herewith are timely submitted comments regarding Draft Advisory Opinion 2003-37 which is on the agenda for Thursday, February 5, 2004.

Attachments:

14 comments



Republican National Committee

Counsel's Office

February 4, 2004

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

VIA FACSIMILE: (202) 219-3923

RE: AOR 2003-37
Americans for a Better Country

Dear Mr. Norton:

As the Commission is aware, the Republican National Committee actively opposed the regulation of free speech contained in the Bipartisan Campaign Reform Act ("BCRA"), and fought its constitutionality in the courts. In commenting on the General Counsel's draft in Advisory Opinion Request 2003-37, the RNC recognizes that the Supreme Court upheld BCRA's regulation on political speech and, whatever our objections on principle to the statute, it is now the law of the land.

Within that context, the approach of the General Counsel's opinion is reflective of the law and how it must be enforced to comport with the statute.

The RNC remains committed to the principle that the political parties be able to raise and spend funds legal under state law to support its candidate tickets. However, as long as BCRA is the law, it is imperative that outside groups not be able to circumvent that law by using the very same soft money that the parties now cannot raise to conduct the very same activities for which the political parties must now use only federal dollars.

We do not believe there is any "principle" involved in allowing unfettered and unlimited spending by 527 groups of funds from wealthy individuals, corporations, unions or trade associations when the parties are banned from using such funds. We concur with the General Counsel that under BCRA these so-called "527 organizations"

are political committees that should be required to use federal funds if their activities are geared to electing or defeating federal candidates.

Respectfully submitted,

Charles R. Spies
Election Law Counsel

CC: The Commissioners
VIA FACSIMILE: (202) 208-3333

John Holdsclaw <JHoldsclaw@ncbdc.org> on 02/04/2004 09:33:03 AM

To: mdove@fec.gov
cc: commissionersmith@fec.gov, commissionerweintraub@fec.gov, commissionermason@fec.gov, commissionermcdonald@fec.gov, commissionerthomas@fec.gov, commissionertoner@fec.gov, lnorton@fec.gov

Subject: Comment on Draft Advisory Opinion 2003-37

VIA ELECTRONIC MAIL: mdove@fec.gov

Mary W. Dove
Secretary of the Commission
Federal Election Commission
999 E Street, NW, Room 905
Washington, DC 20463-0002

Re: Draft Advisory Opinion 2003-37

Dear Ms. Dove,

We are commenting on the General Counsel's draft Advisory Opinion prepared in response to a request by Americans for a Better Country. We have profound concerns about the broad scope of the opinion.

We are a nonprofit corporation with a mission of developing, financing and empowering America's communities. We are exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. We regularly seek to educate the public and to advocate positions on legislative and policy issues, including the positions taken by federal officeholders.

If the draft opinion is adopted as proposed by the General Counsel, the result may be that we could no longer conduct these activities unless we raise and spend funds in accordance with the source and contribution limitations of the Federal Election Campaign Act. This would restrict our ability to speak out on policy issues where we have gained significant expertise.

We are not a partisan organization. We express no preference for members of one political party or the other. We are a team of finance and development professionals seeking to address the needs of low-income Americans. If this draft opinion is adopted, we will be less effective in our work and many policy makers will have less of an opportunity to benefit from our experience.

We strongly urge you to reconsider this proposed action. If you have questions about this comment, you may contact me directly at 202.336.7681,

tsimonette@ncbdc.org or John Holdsclaw, NCBDC's director of policy development at 202.218.7289, jholdsclaw@ncbdc.org.

Thank you for considering our views.

Respectfully submitted,

Terry D. Simonette
President & CEO, NCBDC

cc: Bradley A. Smith, Chairman, Federal Election Commission
Ellen L. Weintraub, Vice Chair, Federal Election Commission
Commissioner David M. Mason, Federal Election Commission
Commissioner Danny L. McDonald, Federal Election Commission
Commissioner Scott E. Thomas, Federal Election Commission
Commissioner Michael E. Toner, Federal Election Commission
Lawrence H. Norton, General Counsel, Federal Election Commission

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

February 4, 2004

Federal Election Commission
Mary Dove, Commission Secretary
Lawrence Norton, General Counsel
999 E Street, N.W.
Washington, D.C. 20463

VIA FAX

RE: Comments of Public Citizen, Inc., on FEC Draft Advisory Opinion 2003-37

Public Citizen, Inc., respectfully submits these comments on the General Counsel's Office's draft of Advisory Opinion 2003-37, concerning the circumstances under which non-profit entities, such as "Americans for a Better Country," may use federal and non-federal funds for communications that discuss candidates for federal office.

A. Interests of Public Citizen

Public Citizen has worked hard on behalf of strengthening campaign finance regulations in general, and the passage and defense of the Bipartisan Campaign Reform Act in particular.

Public Citizen is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption of our political processes that results when the influence of corporate money is brought to bear on the electoral system. Public Citizen has long supported campaign finance reform, through both advocacy of campaign finance legislation before Congress and involvement in administrative proceedings and litigation raising campaign finance issues and related First Amendment issues arising out of the electoral process. For example, Public Citizen filed amicus curiae briefs in *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003), *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and joined in an amicus curiae brief in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*").

Attorneys from Public Citizen Litigation Group also participated in the representation of the defendant/intervenors in the Supreme Court proceedings in *McConnell v. Federal Election*

Commission, 124 S. Ct. 619 (2003). In addition, Public Citizen has studied and reported extensively on the increasing involvement of so-called 527 groups and other non-profit organizations in electioneering activities, as politicians and their financial backers have sought to evade the contribution limits and reporting and disclosure requirements applicable to more traditional political organizations. Thus, Public Citizen has an intense and longstanding interest in the issues addressed by this opinion.

Public Citizen has long believed that 527 groups, in particular, should be subject to increased regulation comparable to that applicable to political committees under the Federal Election Campaign Act (FECA), and it has supported legislative reforms that have taken steps in that direction by imposing disclosure requirements on such groups. While Public Citizen believes that further regulation of such groups is desirable, we are troubled by the implications of proceeding in the manner proposed in the draft advisory opinion. Specifically, Public Citizen is concerned that the *proposed definition of federal election activity and "expenditures" subject to the source prohibitions and contribution limits of FECA is so broad that legitimate activities of all non-profit organizations, not just Section 527s, may be inappropriately captured under FECA.*

B. The Proposed Definition of "Expenditures" Is Not Limited in Scope

By importing the definition of "federal election activity" in 2 U.S.C. § 431(20)(a)(iii) into the definition of "expenditure" in 2 U.S.C. § 431(9), the Commission would subject a potentially wide range of activities by a variety of groups to regulation not authorized by statute. The far-reaching, and possibly unintended, ramifications of the draft opinion's reasoning are not limited to FECA "political committees" or to 527 groups.

The aspects of the draft opinion that are of special concern to Public Citizen are its statements that communications not involving express advocacy that "promote or support, or attack or oppose a clearly identified federal candidate" constitute "expenditures" within the meaning of 2 U.S.C. § 431(9), and hence can only be made by a political committee using federal funds. *See, e.g.* Draft Opinion at 12-13. Further, the draft opinion extends the definition of federal election activity subject to regulation under FECA to political advertisements beyond the 60-day bright-line standard of BCRA's definition of "electioneering communications" (at least for Americans for a Better Country). *See* Draft Opinion at 14-15.

The draft opinion reaches these conclusions by positing that the definition of "federal election activity," which determines (under BCRA, Title I) whether political parties and officeholders (and related persons) must pay for particular types of communications with federal funds, "is equally appropriate as the benchmark for determining whether communications paid for by political committees must be paid for with Federal funds." Draft Opinion at 3. The draft opinion therefore reads the definition of federal election activity into the FECA definition of "expenditure" and thus, effectively, requires that such communications be financed with Federal funds even when engaged in by entities not otherwise subject to Title I of BCRA: "As explained above, a payment by a political committee for a communication that promotes, supports, attacks, or opposes a clearly identified federal candidate is 'for the purpose of influencing a federal

election,' and therefore an 'expenditure' within the meaning of 2 U.S.C. § 431(9) that must be paid for entirely with Federal funds." Draft Opinion at 12.

While there appears to be some expectation among other commenters that the scope of this draft opinion is limited to Section 527 groups, nothing in the draft opinion provides any such reassurances. In fact, due to the nature of the advisory opinion request from Americans for a Better Country (ABC), which concedes that the group is a political committee and a Section 527, the draft opinion avoids the arduous task of detailing the breadth or limits of the definition of "political committee" here under consideration. Instead, the draft opinion focuses its ruling on the *activity* subject to regulation – communications that "promote or support, or attack or oppose a clearly identified federal candidate" – rather than the class of *groups* subject to regulation.

Public Citizen recognizes that the advisory opinion on its face says only that a "political committee" would be found to make an "expenditure" within the meaning of 2 U.S.C. § 431(9) if it engaged in non-express advocacy that promoted, supported, attacked or opposed a federal candidate. But we are concerned that the draft opinion's reasoning cannot be confined to "political committees," at least as traditionally understood. Nothing in § 431(9)'s definition of "expenditures" turns on whether the speaker is a "political committee." Indeed, under the statute, it is the other way around: Whether an organization is a "political committee" turns on whether it engages in "expenditures" totaling more than $1,000. *See* 2 U.S.C. § 431(4)(A). The class of "political committee" was further narrowed, not by statute, but by the U.S. Supreme Court when it opined that an organization subject to FECA only includes those groups that have as a "major purpose" the election or defeat of candidates. *Buckley v. Valeo*, 424 U.S. at 79.

It is reasonably assumed that Section 527 groups, which are defined by the tax code as entities whose "primary purpose" is electioneering activity, could conceivably be captured by the "major purpose" test. But if the $1,000 financial activity and the "major purpose" test are the only limitations being offered to the scope of federal election activity subject to FECA, as suggested by this draft opinion, the activities of many 501(c) non-profit groups and other non-527 associations and individuals who dedicate a substantial portion of their activities to praising or criticizing candidates and officeholders *on policy issues* may be subject to capture. Under the advisory opinion, if such organizations spend money on issue-related communications *in any form* that are critical of an officeholder who is a candidate for federal office, they run the risk of being found to have made an "expenditure" subject to FECA and thus to be subject to the gamut of FECA's limitations on the raising, reporting, and expenditure of federal funds.

Arguably, *any* organization that spends at least $1,000 on communications with some significant amount of activity that criticizes (or praises) a federal candidate would turn itself into a "political committee" under the reasoning of the draft opinion, and all of its issue advocacy could thereafter become subject to FECA's requirements. Such organizations would be prohibited from using grant funds from foundations, corporations and unions and funds received from individuals in excess of contribution limits for activities that discuss candidates and officeholders.

Public Citizen shares one of the principal goals that appears to animate the draft opinion: bringing organizations that are in fact devoted to electioneering — in particular 527 groups —

under more effective regulation. The means chosen by the draft opinion, however, seem questionable to us in that they appear to contradict what remains the authoritative construction of FECA by the Supreme Court in both *Buckley* and *McConnell*. We respectfully suggest that much of the analysis of the draft opinion (indeed, virtually all of its discussion of what activities must be paid for with federal funds) be reconsidered in light of these concerns.

Respectfully submitted,

Joan Claybrook
President
Public Citizen

Frank Clemente
Director
Public Citizen's Congress Watch

Scott Nelson
Attorney
Public Citizen's Litigation Group

Craig Holman
Legislative Representative
Public Citizen's Congress Watch

AMERICAN LUNG ASSOCIATION.

February 4, 2004

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2003-37, Americans for a Better Country

Dear Commissioners:

As 501(c)(3) nonprofit organizations, our activities include public education and advocacy concerning the issues that our organizations were created to address. To carry out our purposes, we often describe pending legislation or proposed legislation and its impact. As 501(c)(3) organizations, we do not engage in any electioneering activity nor do we oppose or support any candidate for election to public office. We are also strictly nonpartisan organizations that encourage and welcome support for our goals and policy proposals from all policymakers and members of the public regardless of political party or affiliation. The Campaign for Tobacco-Free Kids is a nonprofit 501(c)(3) corporation that works to promote public policy changes that will prevent and reduce tobacco use and related harms, especially among kids. The American Lung Association is a nonprofit 501(c) (3) organization that works to prevent lung disease and promote lung health.

We realize that the draft advisory opinion in response to the request from Americans for a Better Country (ABC) is only an *advisory* opinion that technically applies only to the specific facts and circumstances presented by the ABC request. But we are concerned that the advisory opinion's broad and far-reaching interpretation of existing law constitutes a radical change to existing interpretations of federal election law that could have a chilling effect on the vigorous exchange of ideas and information regarding federal policymaking that is required for the healthy operation of our democratic system.

More specifically, current law prohibits 501(c)(3) nonprofits from making any "contribution or expenditure in connection with any election to any political office" (FECA Sec. 441b); and existing interpretations of this restriction have not in any way curtailed the ability of these nonprofits to notify the public about public policy deliberations in Congress, inform them of the related positions or actions of their elected representatives, and encourage members of the public to contact their elected representatives to thank them for past actions, educate them about pending legislative matters, or even to urge them to support or oppose pending legislation (within the limitations placed on lobbying by 501(c)(3) nonprofits). But the draft advisory opinion

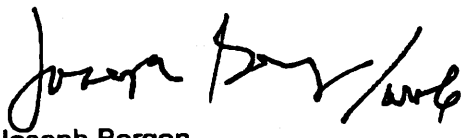
not only defines "expenditure" to include any communication that "promotes, supports, attacks, or opposes" a candidate for federal office but appears to interpret that new definition broadly to include any communication that identifies an elected official facing reelection and refers to that elected official in either a positive or negative way – even if the communication makes absolutely no direct or indirect mention of any upcoming election and makes no statement of general support or opposition regarding the official.

Such an interpretation has no basis in existing statutes or judicial interpretations, and its practical application would be disastrous. It could, for example, prohibit nonprofit 501(c)(3) charitable and educational organizations from making any communications that inform members of the public of the current positions of their elected officials on pending legislation relating to the nonprofit's key issues of concern. Such a constraint would not only severely limit the existing rights nonprofit organizations have to engage in nonpartisan efforts to inform and influence federal policy making but would also inevitably reduce public knowledge about their elected representatives and their positions.

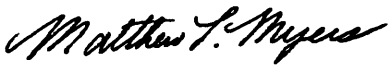
Legal interpretations in other portions of the draft advisory opinion could similarly restrict the existing right of 501(c)(3) nonprofits to engage in other nonpartisan activities.

We ask the Commission to reject the current draft advisory opinion and ensure that the final opinion does not in any way curtail the existing right of 510(c)(3) nonprofits to engage in nonpartisan communications and other activities that are not meant directly or indirectly to oppose or support the election of any candidate for political office. Besides stating that the final opinion does not apply to 501(c)(3) nonprofits and is not meant to curtail their existing rights, the final ruling also should not contain any interpretations of existing law that are inconsistent with that position.

Respectfully submitted,



Joseph Bergen
Chief Operating Officer
American Lung Association



Matthew L. Myers
President
Campaign for Tobacco-Free Kids

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February 4, 2004

Mary Dove
Commission Secretary
Federal Election Commission
999 E St., N.W.
Washington, D.C. 20463

RE: COMMENTS ON DRAFT ADVISORY OPINION 2003-37
By fax: 202-208-3333 and 202-219-3923

Dear Ms. Dove:

On January 29, 2004, the Commission made available for public comment the draft of Advisory Opinion 2003-37, requested by Keith A. Davis on behalf of Americans for a Better Country. This letter has two comments on the proposed draft – one general, the other specific:

General Observation:

The proposed draft advisory opinion is one of the first to be offered since the Supreme Court's decision in *McConnell v. Federal Election Comm'n*, 540 U:S. ___, 124 S.Ct. 619 (2003). As such, the AO will be carefully scrutinized by the regulated community for indications of the Commission's post-*McConnell* intentions. The draft of AO 2003-37 already drew significant discussion at the January 30, 2004 meeting of the American Bar Association's Political Organization Subcommittee of the Section of Taxation.

From personal observation, much of the discussion concerned perceptions of significant shifts in the Commission's interpretations and enforcement posture toward organizations OTHER than political committees. One of the reasons for these perceptions appeared to be the broad language used in the draft AO, and the absence of limiting language indicating the precise boundaries of the concepts discussed in the draft. A specific example (concerning sweeping language which appears in clear conflict with existing regulations defining "clearly identified candidate") is discussed in more detail below.

Another example is the language of and pertaining to footnote 2 on page 3 of the draft. By equating a sweeping statement such as "By their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections" with the

footnote's quoting of *McConnell*'s footnote 68 as discussing "many of the targeted tax-exempt organizations," the draft raises the specter that its doctrines and analyses sweep more widely than the requester, or indeed, other political committees.

With a request for an opinion as broad as that requested by Americans for a Better Country, it may be difficult to cabin the language used in the final AO. Yet, in light of the timing and context of this publication, the Commission should be careful to limit its opinion to the facts and precise situation described. For example, if the Commission intends its discussion of the allocation rules of 11 C.F.R. § 106.6 to be applied only to political committees, it should include a statement so indicating. If, on the other hand, the Commission's principles are intended to sweep more broadly, the Commission should so indicate, perhaps by a phrase indicating that the principle has more general application.

In particular, and given the deference Congress gave in BCRA to various types of 501(c) organizations (as with exempting 501(c)(3) organizations from the restrictions on electioneering communications), the Commission should clarify which, if any, of the doctrines and analyses in the draft AO actually apply to 501(c) organizations. This is particularly important, as shown below, to the concept of genuine "issue advertisements" (which are still permitted under both FEC and Internal Revenue Service regulations) and discussions of positions on issues in the material on and surrounding Page 19 of the draft. Otherwise, this AO alone threatens to chill, if not strangle, the running of legitimate issue advertisements against or in favor of any federal legislator who also happens to be a candidate at the time legislation comes up for consideration.

Specific Errors on Page 19 of the Draft:

The analysis on Page 19 and the surrounding material of the draft Advisory Opinion conflict with both Commission regulations and common sense. For example, the material between lines 4 and 15 says, in part, that the proposed communications "do not mention specific candidates but urge the general public to support candidates associated with particular positions on issues." Yet this lack of identification of candidates would appear to conflict with 11 C.F.R. 100.17. The regulations define "clearly identified candidate" as:

> The term clearly identified means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ``the President,'' ``your Congressman,'' or ``the incumbent,'' or through an unambiguous reference to his or her status as a candidate such as ``the Democratic presidential nominee'' or ``the Republican candidate for Senate in the State of Georgia.''

To suggest that urging "the general public to support candidates associated with particular positions on issues" is the same as saying "the Democratic presidential nominee" is a dramatic expansion of the regulatory definition of "clearly identified." In addition, the expanded definition would conflict with traditional forms of public communication with officeholders,

particularly in an election year. Congress does not stop working during an election year. BCRA's new definition of "electioneering communication" recognizes this governmental reality and draws a temporal balance between speech rights and efforts to combat perceptions of corruption. (In addition, section 501(c)(3) organizations are completely exempted from these restrictions, and section 501(c)(4) organizations are permitted to run such communications.) As proposed, the material on Page 19 draws no such balance and may upset the balance struck by Congress.

Combine the overbroad language on Page 19 with the sweeping language identified above, and the proposed draft can have a dramatic and chilling effect on non-election related speech. Even 501(c)(3) organizations, which might otherwise run perfectly acceptable issue advertisements close to elections, could legitimately question whether they would run afoul of the Commission's expanded definition and analysis.

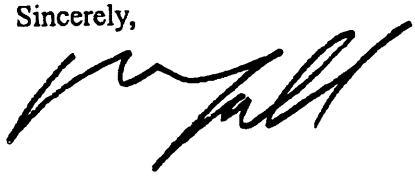
Apparently Pages 19 and 20 of the draft draw some distinction between "partisan targeting of the audience that will receive this message." Yet "partisan targeting" does not expand the definition of "clearly identified candidate" in 100.17. If the Commission intends some specific expansion beyond the "unambiguous" references used in the definitions, it will be requiring analyses of issue positions in geographic or demographic target choices.

In other words, is the Commission assuming that all Democrats are pro-choice and thus a pro-choice message will be the functional equivalent of saying "the Democratic presidential nominee?" Even if the answer to that question at the moment is "yes," the answer on less obvious issues will not be. Immigration reform, for example, splits both major parties. How would a Republican-targeted message of "no amnesty for illegal aliens" be treated? This is a practical quagmire that lends itself to significant arbitrariness. The end result will be the unnecessary chilling of otherwise protected political speech, simply because the draft AO swept more broadly than the regulations.

The Commission should delete the language on Page 19 and return to the regulatory definition of "clearly identified candidate" in 11 C.F.R. § 100.17.

I would be happy to provide more information on request.

Sincerely,



Barnaby Zall
Of Counsel

National Council of Nonprofit Associations

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January 4, 2004

By Hand Delivery and Facsimile Delivery (202.219.3923)

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

The National Council of Nonprofit Associations (NCNA) submits these comments in response to the General Counsel's draft of Advisory Opinion 2003-37 (the "Draft Opinion"). NCNA strongly encourages the Commission not to issue the Draft Opinion due to the broad ramifications it could have not only on political committees but also on 501(c)(3) and 501(c)(4) organizations by virtually cutting off a significant voice for the American people.

NCNA is a membership-based organization organized as a nonprofit corporation under state law and exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"). It represents a network of 38 state and regional associations of nonprofits serving over 22,000 charities nationally. The majority of our members and their members are organized as nonprofit corporations under state law and exempt from federal income taxation under Code section 501(c)(3).

We recognize that while this Draft Opinion is given in response to a request from a political committee, many of the activities that the Draft Opinion would treat as expenditures under the Bipartisan Campaign Reform Act of 2002 (BCRA) seem strikingly similar to activities of 501(c)(3) organizations that had not previously been treated as expenditures. These activities are more appropriately characterized as lobbying or fundraising or nonpartisan voter activation. We fear that in its attempts to regulate the activities of political committees, the Commission would be announcing its intent to limit legitimate,

nonpartisan activities of 501(c)(3) organizations as well. Such overreaching threatens constitutionally protected activities.

One of our major concerns is the Commission's redefinition of "expenditures" to include all communication that "promotes, supports, attacks, or opposes" a candidate for federal office. This move would be creating a new test, one that far exceeds the broadcast limits contained in BCRA and could be viewed as overstepping the legal authority of the Commission. BCRA does not allow the Commission to extend the definition of "expenditures" to include all communication, including print ads, letters to members, fundraising letters, web sites, and messages from door-to-door canvassers. In upholding BCRA, the United States Supreme Court stated that interest groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." McConnell v. FEC, 540 U.S. ___ at ___ [slip op. at 80]. By accepting the Draft Advisory Opinion, the Commission would be limiting speech that Congress itself refused to limit.

The NCNA network and other 501(c)(3) and 501(c)(4) organizations are actively engaged in educating the public and advocating positions on legislative and policy issues related to our charitable missions and the people we serve. We represent an essential, if not the only, method to assure that the voices and concerns of the general public are presented during ongoing policy and legislative debates. To cut off this necessary method of communicating, which this Draft Opinion may do, is unconscionable. For example, in our advocacy work, it is frequently valuable to refer to current elected federal officeholders who support or oppose our positions. The Draft Opinion fails to distinguish between speech that "promotes, supports, attacks, or opposes" an elected official acting in her official capacity and speech that praises or criticizes a candidate for public office, even if already an elected official. We currently abide by federal law, through the tax code, that prohibits 501(c)(3) organizations to participate in, or intervene in political campaigns on behalf of (or opposition to) candidates for public office. More critically, it is essential to preserve the right to criticize our government, including our elected officials, one of the most cherished rights granted us under the United States Constitution.

For NCNA and its members, another disturbing outcome of the approval of the Draft Opinion may be that we could no longer conduct our advocacy activities unless we raise and spend funds in accordance with the source and contribution limits of the Federal Election Campaign Act ("FECA"). FECA prohibits contributions over $5000 from individuals, and all grants and contributions from corporations, which includes most foundations— a major source of funding for most 501(c)(3) organizations. Consequently, 501(c)(3) organizations, often the only voice for the voiceless on all sides of the political spectrum, would be silenced.

As described above and as the Commission recognized in its BCRA rulemaking when it exempted the communications of 501(c)(3) organizations from the definition of electioneering communication, federal tax law requires that 501(c)(3) organizations avoid even the slightest hint of support for or opposition to candidates for public office. Thus, any Commission ruling that legitimate 501(c)(3) activities might also be expenditures under BCRA would create inevitable complications for charitable organizations seeking to comply with both tax and election laws. The Commission has already stated that "the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity," and we encourage the Commission to remain consistent with its earlier decision. Final Rules, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002).

For all of the reasons discussed above, we urge the Commission not to adopt the Draft Opinion.

Sincerely,

Audrey R. Alvarado, Ph.D.
Executive Director

cc: Commissioner Bradley A. Smith, Chairman
Commissioner Ellen L. Weintraub, Vice Chair
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner

M N A

Michigan Nonprofit Association

February 4, 2004

Commission Secretary
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

2004 FEB -4 A 11:46

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

On behalf of the Michigan Nonprofit Association, representing over 750 nonprofits across the state, I urge the Commission not to issue this draft advisory opinion regarding the advocacy efforts of Americans for a Better Country (ABC) and its significant ramifications for all nonprofits involved in advocacy.

As you already know organizations deemed 501(c)(3) by the IRS, are forbidden from electioneering however they are permitted to lobby within limits. The Opinion, because of its broad scope, will put additional restrictions if not halt many advocacy activities of organization's with charitable missions. These efforts include advocating in support or opposition to issues that affect the lives of those they serve and the resources they protect. At times these efforts may include communications that reference elected officials.

According to this Opinion, these communications would no longer be allowed unless groups raised and spent funds in accordance with the limitations of the Federal Election Campaign Act. This would mean that many local and state organizations, which policymakers and the public want to hear from, would be unable to advocate on behalf of those they serve. This barrier is due to limitations with the 501(c)(3) tax code, which prohibits charities from having separate funds for political activity, and the lack of capacity and resources of organizations to form groups that allow for this activity.

Again, I urge you to reevaluate the content of this opinion and consider its current broad implications for charities across the country.

Sincerely,

Sam Singh
President and CEO

LISC
Helping neighbors build communities

February 4, 2004

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

Local Initiatives Support Corporation is writing to express our strong concern regarding the scope and implications of the General Counsel's draft Advisory Opinion 2003-37 prepared in response to a request by Americans for a Better Country ("ABC").

LISC is a nonprofit corporation under state law and exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. We are actively engaged in educating the public and advocating positions on legislative and policy issues related to our charitable mission of revitalizing distressed low-income communities, often referencing current elected federal officeholders who have supported or opposed those positions – activities that the Commission noted in its October 23, 2002 rules on "electioneering communications" are considered by the public to be "highly desirable and beneficial."

If the Commission adopts Advisory Opinion 2003-37 as proposed, the result may be that we and many of our community partners could no longer conduct those activities unless we and they raise and spend funds in accordance with the source and contribution limits of the Federal Election Campaign Act ("FECA"). Federal tax law, however, prohibits 501(c)(3) organizations from establishing or maintaining a separate segregated fund to engage in political activity. Furthermore, we and our partner organizations rely on a mix of large and small contributions from foundations, corporations and individuals. Consequently, this Opinion would effectively shut down the critical advocacy work of many nonprofit organizations.

Local Initiatives Support Corporation
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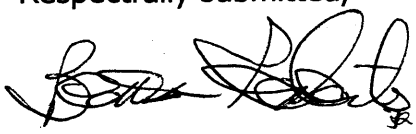
Although this advisory opinion is given in response to a request from a political committee, many of the activities that the opinion would treat as expenditures under the Act seem strikingly similar to activities of 501(c)(3) and 501(c)(4) organizations that had not previously been treated as expenditures, including activities more appropriately characterized as lobbying or fundraising or nonpartisan voter activation. We fear that in its attempts to regulate these activities of political committees, the Commission announces its intent to limit the legitimate, nonpartisan activities by 501(c) organizations as well. We believe such action would be inappropriate.
We share the concerns expressed in comments submitted by a coalition of nonprofit organizations including the Alliance for Justice, Leadership Conference on Civil Rights, League of Conservation Voters, NAACP, NARAL Pro-Choice America, People for the American Way, Planned Parenthood Federation of America, and Sierra Club. We are particularly troubled by the suggested restrictions on voter registration efforts and fundraising communications, and the implied prohibition on contributions by foreign nationals to any nonprofit organizations engaged in voter registration, get-out-the-vote and other activities in connection with a federal, state, or local election for public office. These nonpartisan activities are vital to increasing civic participation by all citizens.

For all of these reasons, we strongly urge the Commission not to issue the draft opinion in its present form. Please feel free to contact me if you have questions or would like further information.

Respectfully submitted,



Benson F. Roberts

cc: Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Bradley A. Smith
Commissioner Scott E. Thomas
Commissioner Michael E. Toner
Commissioner Ellen L. Weintraub

SEIU
Stronger Together

February 4, 2004

By Electronic and Hand Delivery
Commission Secretary
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

RE: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

The following comments are being submitted by the Service Employees International Union ('SEIU") in response to the General Counsel's draft of Advisory Opinion 2003-37. SEIU joins in the comments to the draft Advisory Opinion filed by the AFL-CIO and a number other Unions ("AFL-CIO Comments"). However, we are writing separately to emphasize the impact of the draft Advisory Opinion on SEIU's ongoing public communications program on issues of concern to our members and their families.

As discussed in the AFL-CIO Comments, the General Counsel's draft would expand the Federal Election Campaign Act's definition of "expenditure", 2 U.S.C. 431(9), to include any "public communications that promote, support, attack or oppose a federal candidate." See. G.C, Draft at 3. Not only is this interpretation a radical departure from existing case law and the clear terms of the Act, it raises constitutional issues that the drafters of the BCRA sought to avoid and that the Supreme Court in *McConnell v. Federal Election Commission*, 540 U.S. ___, 124 S. Ct. 619 (2003) did not have to address. The constitutional issues raised by the General Counsel's effort to effectively amend Section 431(9) are illustrated by SEIU's public issue communications which are financed with non-Federal funds but, if the General Counsel's views were to prevail, could be argued must be paid for exclusively with Federal funds.

The SEIU is the largest affiliate of the AFL-CIO with over 1.5 million members employed in health care, public service, and building service. A significant number of SEIU members are recent immigrants to this country. SEIU regularly engages in public communications on issues of concern to its members and their families. These communications include press releases, free and paid media, direct mail and the distribution of handbills. SEIU's public communications often focus on actions or policies of the Federal Government or legislation pending in the U.S. Congress and are often critical of the actions taken by Federal office holders who may be candidates for reelection. SEIU attempts to educate the public on these issues and to mobilize public support for or against pending legislation or

ANDREW L. STERN
International President

ANNA BURGER
International Secretary-Treasurer

PATRICIA ANN FORD
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government policy. SEIU's public communications on these issues do not expressly advocate the election or defeat of any candidate or support or opposition of any political party. They are aimed at affecting legislation or executive actions, not federal elections.

In the past year, SEIU has issued public communications, which could be claimed to fall within the General Counsel's definition of "expenditure", challenging President's Bush's proposal to grant temporary status – without a path to citizenship - for immigrant workers; attempting to organize public opposition to President Bush's Medicare Drug Plan and criticizing the plan after its passage by Congress; soliciting public support for a Senate filibuster to block President's Bush's proposal to limit overtime pay; and challenging the Bush administration's plan for mass smallpox vaccinations for health care workers. Samples of these public communications are attached to this submission.

For the reasons state above, and in the AFL-CIO Comments, we respectfully submit that the Commission should not adopt the draft Advisory Opinion.

Respectfully submitted,

Judith A. Scott

Judith A. Scott
General Counsel
Orrin Baird
John J. Sullivan
Associate General Counsel
SEIU

ANDREW L. STERN
International President

ANNA BURGER
International Secretary-Treasurer

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What does Bush's 'temporary immigrants' proposal mean to you?

President Bush often gives speeches praising immigrants. But his "temporary immigrant" proposal is not what immigrant or native-born workers need.

Temporary Status—Not Citizenship

- Immigrants already working and paying taxes in the U.S. would not be able to become citizens and would not get green cards.
- Instead, they could get a temporary visa to work.
- When their visa expires, they would have to go back to their original country.
- New immigrants could come to the U.S. legally only to work for a specific employer who wants them.

Lower Wages and Benefits, Less Job Security for All

- A worker who is no longer wanted by their employer would have to find a new willing employer or they would have to leave the U.S.
- That gives employers total power over workers. If you speak up against low pay, lack of health coverage, unsafe conditions, or other abuses, you risk losing your temporary visa.
- This pool of temporary workers with no rights would be used by employers to drive down pay and benefits for all workers -- immigrant and native-born.

Real immigration reform would let hard-working, taxpaying immigrants in the U.S. become citizens with permanent legal status. That would protect pay and benefits for all workers.

Together, we can win immigration reform that benefits working people—not just big corporations.

1. **Register to vote if you're eligible.**
2. **Join our union's Fight for the Future Campaign.**
3. **Call President Bush at (202) 456-1111 Tell him to keep his promise to let hard-working, taxpaying immigrants earn permanent legal status.**

SEIU
Stronger Together

Bush's Medicare Drug Plan Could Have Serious Side Effects for Seniors

Campaign Launched:
October 29, 2003

Congress is considering prescription drug legislation that could make things worse, not better, for seniors struggling to afford the high cost of medications. The radical changes being proposed could hurt current and future retirees, including you. **Please send a fax to your U.S. senators today.**

Sample Letter for Campaign

Subject: Stop Medicare Privatization

Dear *[Decision Maker]* ,

I am writing to oppose the prescription drug legislation the U.S. House of Representatives and Senate are considering right now.

Privatizing Medicare will be a boon for HMOs, but it won't help millions of retirees struggling to pay for prescriptions. It will increase out-of-pocket premiums and do absolutely nothing to hold down runaway prescription drug costs.

Half of all seniors won't save any money at all on their prescriptions. What's worse, the current plan supported by President Bush and many Republicans in Congress could cause some employers to drop coverage for retirees -- making millions of people worse off than they are today.

It is outrageous that so many seniors must pay so much for the prescription drugs they need. I hope you will do the right thing and only vote for prescription drug legislation that makes things better, not worse.

Any form of Medicare privatization is the wrong direction to go.

Sincerely,
[Your Name]
[Your Address]

Background Information

They're coming after Medicare—just like overtime pay.

This week the Bush administration and its allies in Congress are targeting Medicare--just as they have targeted overtime pay and good jobs. Behind closed doors, a final proposal to add a prescription drug benefit to Medicare is being hammered out--and tragically, the deal being hatched is a trick proposal that would radically change Medicare and harm more than help America's current and future retirees.

The proposed changes in Medicare would:

- Privatize Medicare and put seniors at the mercy of insurance companies.
- Leave millions of seniors with huge drug costs despite a 50% Medicare premium increase.
- Threaten employer-provided prescription drug coverage--4 million retirees who have coverage now could lose it.
- Increase future premiums by 25 percent if you stay in the Medicare you know with the doctor of your choice.
- Prevent our government from reining in prescription drug prices.

Half of all seniors won't save any money on their drug costs. Isn't a prescription drug benefit supposed to save seniors money? Every retiree should have prescription drug coverage under Medicare.

You can take action to stop these cynical changes before they become law. Please take one minute right now to send your U.S. senators a fax.

FOR MORE INFORMATION ABOUT THE MEDICARE ISSUE VISIT THE AFL-CIO'S WEB SITE

Who is Looking Out for You? Bush Tells Employers How to Avoid Paying Overtime

Campaign Launched: January 08, 2004

As if the assault on overtime was not enough, now the Bush Labor Department has published tips for employers on how to avoid paying overtime to workers that remain eligible under the new proposed rules. A last stand on overtime is scheduled this week in the Senate as part of the Omnibus spending bill deliberations. Please do TWO things today. Tell your senators that you expect them to protect overtime pay by voting against the Omnibus bill and then use the Tell-A-Friend tool to pass this message to friends, family and co-workers.

Sample Letter for Campaign

Subject: Protect Overtime Pay!

Dear *[Decision Maker]* ,

I urge you to protect workers' paychecks by voting against cloture and continuing to filibuster the omnibus spending bill from which overtime pay protections were dropped. Overtime pay is a critical part of the family income of millions of America's working families. No worker should lose his or her overtime pay or protections.

I was angered to learn recently that the Department of Labor has published tips for employers on how to avoid paying workers for their overtime hours. Helping employers cut the paychecks that support working families should not be the role of any part of our government, much less the Labor Department! I hope you were outraged as well and will use your vote to stop the attack on overtime pay.

Please vote against cloture on the omnibus spending bill and support the continued filibuster so you can preserve overtime pay protections for some 8 million workers. This is one of the issues I will use to evaluate your commitment to working families. I urgently await your reply.

Sincerely,

[Your Name]
[Your Address]

Background Information

Overtime pay cuts being pushed by the Bush administration are slated to go into effect for millions of workers unless Congress acts to block them. These changes would erode the 40-hour workweek and mean that if you receive overtime pay now, you might not in the future. Both the U.S. Senate and the U.S. House previously voted to oppose the Bush overtime pay take-away however President Bush's lobbyists have managed to remove overtime protections from pending legislation.

In addition, the Associated Press has revealed in recent press coverage that the Bush Labor Department is actually helping employers figure out how to reclassify some workers or change jobs around so they don't have to pay overtime. The Bush administration is giving out tips to employers on how to cut workers' paychecks.

Analysis from the Economic Policy Institute shows millions could lose overtime pay, possibly including firefighters, police officers, nurses, retail clerks, certain medical technicians, military reservists, tech workers and many, many more. Under the Bush plan, you still may be forced to work overtime hours—but you might not be paid for the extra hours.

Overtime pay makes up about one-fourth of the average weekly earnings of workers who receive it. That is an average pay cut of $161 a week and can add up to thousands of dollars a year. Can you imagine the government cutting the pay of a firefighter by thousands of dollars per year? How much would you lose? These overtime

pay cuts are like a giant new tax on working families by a president who, at the same time, works hard to give tax breaks to millionaires.

With a struggling economy, millions out of work and staggering health care and prescription drug costs, this is a burden America's workers should NOT have to bear. The overtime rules protect workers from bosses who would impose unbearably long hours if they didn't have to pay extra for overtime work. Many workers would have less predictable work schedules because of the increased demand for overtime work.

The U.S. Senate should again act to block President Bush's overtime pay take-away. Please act today.

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FOR IMMEDIATE RELEASE
Dec 8, 2003

CONTACT:
TJ Michels
(202) 898-3321

CONTACT US

STAY INFORMED

SEARCH PRESS RELEASES

A statement by Andrew L. Stern, President, SEIU, on President Bush's Prescription Drug Bill

"Retirees and people with disabilities have been counting on President Bush and Congress to deliver the prescription drug coverage they need. Instead, they got a lemon of a plan that caters to the interests of drug and insurance companies -- not seniors.

"The bill President Bush just signed does nothing to control skyrocketing drug costs and puts the future of Medicare and the health of our nation's seniors at grave risk. Only about half of America's seniors will receive any benefit at all from the plan, and nearly three million retirees who are covered by employer–provided benefits stand to lose the coverage they have now.

"What's more, this plan puts private insurance companies and HMOs in charge, by allowing them to determine which drugs are covered and how much they will cost.

"Privatizing Medicare and forcing millions of seniors into HMOs is not the affordable prescription drug coverage President Bush promised America's seniors.

"As the nation's largest health care union, the Service Employees International Union's 1.6 million members and retirees will continue the fight in 2004 for President Bush make good on his promise to give America's seniors REAL relief from soaring prescription drug prices."

###

With 1.6 million members including 130,000 retirees, SEIU is the nation's largest and fastest growing union, representing nurses, janitors, and public employees, among others.

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FOR IMMEDIATE RELEASE
Dec 13, 2002

CONTACT:
TJ Michels
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Christy Hawkins Davis
202-746-6962

CONTACT US

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Media: Sign up to receive breaking SEIU news

SEARCH PRESS RELEASES

As Bush Plan for Mass Smallpox Vaccinations Stirs Controversy...

Nation's Largest Health Care Organization Says Hospital Workers, Patients Will Face Unnecessary Risk

> "The Administration and Congress have protected the wealth of the drug companies who produce the vaccine, but not the health of hospital workers and the public. President Bush's smallpox plan will put thousands of Americans at unnecessary risk."
> -- *Andrew L. Stern, SEIU President*

WASHINGTON, DC – Ignoring health professionals' mounting concerns, President Bush confirmed today that health workers will be the first to receive the controversial smallpox vaccine but refused to take steps to protect them, their families, and their patients from unnecessary risks.

"President Bush's smallpox plan puts hospital workers and their patients at unnecessary risk," said Andrew L. Stern, President of the 1.5 million member Service Employees International Union (SEIU), the nation's largest health care organization.

The vaccine is risky for 1 in 6 Americans who are pregnant, suffer from eczema or other skin disorders, or whose immune systems are suppressed because of conditions like HIV, cancer, or transplant treatments, according to the Centers for Disease Control and Prevention. However, Bush's plan fails to provide free, confidential screening for those conditions before workers or the public are given the vaccine. It also does not do enough to safeguard vulnerable patients who could come into contact with the 500,000 hospital workers being asked to volunteer for the vaccine.

"Health care workers want to be able to care for patients if a smallpox outbreak occurs," said Diane Sosne, RN, National Co-chair of the SEIU Nurse Alliance. "But it is wrong to put caregivers, their patients, and their families at risk when there is a safer way."

Although President Bush and Congress protected the drug companies who produce the vaccine from liability, the

administration has refused to ensure that people who receive the vaccine do not face loss of income if they cannot work as a result. Experts say approximately 1 in 3 people vaccinated will feel too sick to work and provide proper patient care for one or more days. As many as 1,000 of every million will suffer serious reactions.

People who are injured by childhood immunizations have a simple and fair way to get help through the Vaccine Injury Compensation Fund, but no such system will be available for people receiving the smallpox vaccine.

After health workers receive the vaccine, the Bush plan calls for millions of firefighters, police, and other "first responders" to be vaccinated. In about a year, the vaccine will be offered to the public.

SEIU has asked President Bush to monitor the initial volunteers to receive the vaccine, track their response, and make that information available so the public can make an informed decision about whether they want to receive the vaccine.

"No one should get this vaccine without getting screened and understanding the risk for themselves and their family," said Stern. "But under this plan, only people who can afford to pay for the tests or whose insurance might cover it will be protected."

SEIU leaders have met with federal, state, and local officials, and nurses and other employees are working together with management in some hospitals to urge them to enact a safe vaccine plan.

See below for more information on what health care workers want in a vaccine plan.

Nurses, doctors, and other health workers throughout the country are available to talk about their concerns. To schedule interviews, or for more information about how health care workers united in SEIU are working together for a better smallpox vaccination plan, contact TJ Michels at (202) 898-3321.

A smallpox plan that protects health care workers and their patients would:

• Educate workers about the risks for them, their patients, and their families, and ensure that they have the freedom to decline the vaccine without being discriminated against at work.

• Provide free and confidential screening for everyone volunteering for the vaccine – to make sure no one who is particularly vulnerable is given the vaccine.

• Protect vulnerable patients from being exposed to workers who have had the vaccine, and inform them of the safeguards that have been put into place.

• Ensure that people who receive the vaccine do not face loss of income if they can't work as a result. Experts say approximately 1 in 3 people who are vaccinated will feel too sick to work and provide proper patient care for one or more days.

• Compensate people injured by the vaccine. As many as 1,000 of every million people receiving the vaccine will have a serious adverse reaction, 14 to 52 will have a life threatening reaction, and one to two people are expected to die.

• Administer the vaccine with safe needles. The 50 million needles the government plans to ship with the vaccine do not comply with the federal law passed to protect against HIV and hepatitis being transmitted from accidental needle sticks. Individual hospitals can purchase safer needles for only pennies more per needle.

• Monitor volunteers who receive the vaccine to protect any accidental transmission of the vaccinia virus and so any adverse effects can be tracked by the federal government so the public can fully evaluate the risk of the vaccine.

# # #

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SEIU

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February 4, 2004

VIA FACSIMILE

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: ABC AOR 2003-37

Dear Mr. Norton:

The undersigned respectfully submit these comments on the draft opinion that your office produced in connection with the Commission's consideration of Advisory Opinion Request 2003-37 (Americans for a Better Country, or "ABC"). We are writing on behalf of America Coming Together, an unincorporated political entity consisting of a federal account registered with and reporting to the Federal Election Commission (FEC) under sections 433 and 434 of the Federal Election Campaign Act (FECA), and a non-federal account registered with the Internal Revenue Service under section 527 of the Internal Revenue Code.

Below, we note the points of agreement with the conclusions reached in the OGC Draft. We address at length the points of disagreement, most significantly over the draft's concoction of unprecedented and extreme restrictions on communications that refer to a federal candidate and "support, promote, attack or oppose" that candidate. The draft proposes similar restrictions for fundraising communications that refer to a specific federal candidate. These proposed new rules go beyond the Commission's statutory authority; ignore the lines recently drawn by Congress in its revision of the FECA in BCRA; misconstrue and misapply the Supreme Court's recent ruling in *McConnell v. Federal Election Commission*; and in any event, in articulating a wholly novel theory of regulated "expenditures," range far beyond the permissible boundaries of an advisory opinion.

Mistaken Premise: A New Theory of Regulated "Expenditures"

The General Counsel explicitly premises much of the draft advisory opinion on the Supreme Court's decision in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003). In the General Counsel's view, the opinion somehow authorizes the Commission to define, by advisory opinion, the term "expenditure" under 2 U.S.C. § 431(9) to include all "public communications that promote, support, attack or oppose a federal candidate." *See* OGC Draft at 2, 12-15, 16-18, 23.

This interpretation is patently incorrect, as can be demonstrated by the application of recognized canons of statutory construction and legal analysis. In this section of our comments, we address the flaw construction of the OGC theory of "expenditures."

The Definition of "Expenditure"

Section 431(9) of the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." *Id.*; *see also* 11 C.F.R. pt. 100, subpt. D (2003). As the *McConnell* Court related in detail, over the years the Court had construed this term to be confined to communications that "in express terms advocate the election or defeat of a clearly identified federal candidate," so as to avoid unconstitutional vagueness and overbreadth. 124 S. Ct. at 647, 687-88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976)). The *McConnell* Court characterized its opinion in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986), as both reaffirming this construction of "expenditure" and applying the same construction to the prohibition of union and corporate "expenditures...in connection with any [federal] election" in 2 U.S.C. § 441b. *See* 124 S. Ct. at 688 n.76.

While the *McConnell* Court concluded, "the express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command," *id.* at 688, it made absolutely clear that FECA did indeed contain that "limitation." Congress, in enacting BCRA, modified this limitation only insofar as it added "electioneering communications" to the scope of proscribed union and corporate treasury spending:

> Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law .... Section 203 of BCRA amends [§ 441b(b)(2)] to extend this rule, which previously applied only to express advocacy, to all "electioneering communications" covered by the definition of that term in amended FECA §[441b(b)(2)].

Id. at 694.[1] BCRA did *not* amend § 431(9). To the contrary, BCRA specifies that electioneering communications are not "expenditures" under the Act. *See* 2 U.S.C. § 434 (f)(3) (treating electioneering communications as "disbursements"). Congress in BCRA simply identified and restricted "electioneering communications" as a new class of regulated independent expression.

Moreover, the Commission promulgated detailed rules to implement BCRA, and to otherwise modify existing rules in the light of its enactment, and those rules preclude the reading offered by the General Counsel. The "expenditures" prohibited by corporations and unions, for example, are specified, 11 C.F.R. § 114.2(b)(2), and they do not include "public communications" referring to federal candidates that "promote, support, attack or oppose" that candidate. Nowhere in the recent Commission rulemaking conducted pursuant to BCRA does there appear even a proposal to read the term "expenditure" as the OGC now proposes to do.[2]

---

[1] The Court rejected the constitutional challenge to the regulation of "electioneering communications" on the grounds that (1) "the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office," *McConnell*, 124 S. Ct. at 696; (2) "electioneering communications" is neither a vague term nor encompasses an overbroad realm of expression, *id.* at 675, 697; and (3) "electioneering communications" comprise "the functional equivalent of express advocacy," *id.* at 696. If FECA were to be amended further by Congress to compel federal political committee underwriting of additional forms of communication, that amendment would have to satisfy the second and third steps of this analysis.

[2] In fashioning new rules governing nonparty committees like ABC, the OGC draft engages in a highly selective use of legal terms and concepts drawn from the provisions governing political parties and state candidates, It uses the "promote, support, oppose and attack" language, in one instance, but then expressly rejects other importations from the party context, such as the focus on "public communications" or the application of the new rules on party phone banks. OGC draft at pp.17, 18 n.16. The rationale for the OGC's acceptance of some but not others of these party-related provisions seems only to be this: that OGC seeks to limit more rather than less of the nonparty committee's financing options. This is an odd policy choice, made pursuant to a statute that was concerned principally with restricting party soft money, and only narrowly restricting (through the electioneering communication provision) the activities of nonparty committees.

Misapplication of the McConnell Decision

Contrary to the suggestions in the OGC Draft, the *McConnell* decision provides no basis for a different reading. It did not address, let alone suggest, either any modification of the FECA term "expenditure" or any new restriction on communications by unions, corporations, unincorporated associations, non-federal section 527 political organizations or non-party, non-candidate political committees, except for "electioneering communications." Indeed, in rejecting plaintiffs' under-inclusiveness argument – that the proscription of BCRA section 203 did not apply to "print media or the Internet" – the Court noted that the definition leaves all "advertising 61 days in advance of an election entirely unregulated" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* at 697 (quoting *Buckley*, 424 U.S. at 105); *see also* 124 S. Ct. at 702 ("[E]xpress advocacy represents only a tiny fraction of the political communications made for the purpose of electing or defeating candidates during a campaign.").

Congress further accepted in BCRA that tax-exempt Section 501(a) and non-federal Section 527 organizations could continue to engage in what BCRA newly defined as "Federal election activity" under 2 U.S.C. § 431(20). Eschewing limitations on those groups' ability to engage in that activity, it instead restricted fundraising for them by federal candidates and officeholders precisely because they *do* engage in that activity. *See* 2 U.S.C. § 441i(e)(1) & (4). BCRA imposed similar restrictions on state and local party fundraising for section 501(a) organizations that engage in Federal election activity, and completely barred them from raising non-federal funds for most non-federal Section 527 organizations. *See* 2 U.S.C. § 441i(e)(d); 11 C.F.R. § 300.37(a)(3)(iv); *see also McConnell*, 124 S. Ct. at 680 n.69.

In upholding these fundraising restrictions, the *McConnell* Court explicitly and extensively discussed facts in the record reflecting that Section 501(c) and non-federal Section 527 organizations engage in "Federal election activity" with non-federal funds, such as "sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives." 124 S. Ct. at 678 n.68. The Court upheld BCRA's restrictions on the ability of federal candidates and officeholders and state and local party committees "to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates." *Id.* at 678. The Court could not have evidenced more clearly that these organizations would operate under rules very different from those applied to party committees and federal candidates and

officeholders. For this reason, while describing non-federal Section 527 organizations as inherently "partisan," the Court distinguished them in legal status from "federal" political committees. *See id.* at 678-79. Indeed, Congress in BCRA explicitly referred to non-federal Section 527 organizations in Sections 323 and 203, and nowhere else; so, as with other tax-exempt organizations, Congress made explicit choices as to them, which, of course, did not include anything remotely like what the OGC draft proposes.

Yet the OGC analysis would effectively eliminate that distinction. In doing so, it would ignore the policy basis upon which the distinction was based in the first instance. BCRA was enacted to sever the financial links between officeholders, candidates and parties, on the one hand, and tax-exempt groups on the other; BCRA did *not* prohibit tax-exempt groups *themselves* from either engaging in Federal election activity or – independently from officeholders, candidates and parties – raising non-federal funds in order to do so. *See id.* at 678-680, 682-83. Instead, BCRA required state and local party committees – and *only* those committees – to spend federally permissible funds for any "public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. §§ 431(20)(A)(iii); *see also id.* 441i(b)(1). Yet the OGC Draft would override BCRA's text and underlying rationale to substitute policy choices of the Commission that plainly contradict the ones made by Congress.

It is striking, in this context, that *McConnell* plaintiff Republican National Committee and other political parties challenged this and Title I's other "unique speech disabilities" for political parties on equal protection grounds *precisely because* BCRA imposed *no* comparable limitations on "corporations, unions, trade associations, and other interest groups." Brief of the Political Parties at 91-98, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).[3]

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[3]The RNC emphatically argued to the Court that BCRA "singles political parties out" because, "[i]n contrast, corporations, unions, trade associations, and other interest groups not only avoid the collateral restrictions, but are largely unrestricted in raising and spending unlimited, unregulated and undisclosed money from any source to pay for such activities as: voter registration; GOTV; phone banks, mail, and leafleting *at any time*; any broadcast advertising except for 'electioneering communications;' and communications in any form on any subject – including endorsements of federal candidates – to their officers, shareholders, and members." Brief of the Political Parties at 92, *McConnell*, 124 S. Ct. (emphasis in original). The RNC referred to reported efforts already underway by such groups to

And, of course, the Court fully agreed with the RNC's description of BCRA's disparate application as between parties and other groups, confirming that, unlike parties, "[i]nterest groups...remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S. Ct. at 686. But the Court found no constitutional violation because "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation," including that "[p]olitical parties have influence and power in the legislature that vastly exceeds that of any interest group." *Id.* The pervasive premise of BCRA's new restrictions on political parties was that they – unlike independent groups – are vehicles for contributors to secure influence over and elicit obligations from officeholders and candidates, who maintain close relationships with the parties and whose elections the parties are dedicated to securing. *See id.* at 661.

Nonetheless, the OGC Draft reasons that communications that "promote, support, attack or oppose" federal candidates are "expenditures," payable only with federally regulated funds, because, like party committees, non-federal section 527 and section 501(c)(3) groups[4] "are focused on the influencing of Federal elections" and their communications "have no less a 'dramatic effect' on Federal elections." OGC Draft at 3. OGC's premises are incorrect, but even if they were not, the judgment offered here is not one for the Commission to make. Congress made its choices, and as the Court made clear, it chose not to disturb the rules in place for 527s that avoided express advocacy and coordination with federal candidates. Only an amendment to BCRA could appropriate statutory language restricting how state and local parties can finance certain communications, engraft it on another, preexisting FECA statutory term ("expenditure"), and enforce the resulting restriction on other, non-party entities.

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undertake voter outreach that BCRA did not restrict, emphasizing that "BCRA will merely shift nonfederal funds away from political parties to interest groups...." *Id.* at 25.

In their comments now on AOR 2003-37, however, the RNC, without explaining whether or how its portrayal of BCRA to the Court changed by *McConnell* or some other intervening legal event, urges that "it will be important that the same standard for what constitutes 'Federal election activity' under the BCRA be applied across the board, whether to political parties or Section 527 organizations." *RNC Comments* at 1 (January 13, 2004).

[4] The draft here cites *McConnell*'s description of communications and conduct by the NAACP's National Voter Fund, NARAL, and "many . . . tax-exempt organizations." 124 S. Ct. at 678 n.68.

Failure to Consider the Legislative History

In sum, BCRA – the most sweeping reconsideration and revision of FECA since the 1974 amendments – was thoroughly considered and debated, by Congress and neither its text nor its legislative history reflect a trace of a suggestion that FECA could be read as the General Counsel now proposes.

Moreover, this analysis is confirmed by the explicit positions asserted throughout the *McConnell* litigation by the Commission and BCRA's congressional sponsors as they outlined BCRA's history and stressed its limited reach in the realm of speech by non-party, non-candidate entities. As the Commission explained to the district court, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)." Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582). Notably, as the Commission related, this early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office. See 143 Cong. Rec. S10107, 10108." *Id.* at 50.

Redefining "expenditure" is, of course, precisely the course recommended now in the OGC Draft. But BCRA's sponsors *abandoned* that approach after their initial legislative proposals, and instead proposed the distinct and "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the...bill." *Id.* (quoting 144 Cong. Rec. H3801, H3802 (June 28, 2001)). As the sponsors explained to the Court, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582).

The Commission also repeatedly confirmed that FECA as then written did not limit advertisements that did not contain words of express advocacy. "[C]orporations and labor unions can spend unlimited general treasury funds on electoral advocacy outside FECA's regulatory framework, and now do so routinely, through the simple expedient of avoiding express advocacy." Brief for Defendants at 147, *McConnell*, 251 F. Supp. 2d. "Because [election-proximate] advertisements do not include words of express advocacy, the corporate

or union disbursements used to finance them have entirely escaped regulation under FECA." Brief for Appellees at 15, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The Commission further explained that FECA did not limit interest groups that used corporate and union funds for non-express advocacy ads. "While the air wars between business and labor constituted the largest and most direct influx of corporate and union money into the 2000 elections, corporate money also helped fund ads run by various interest groups, who, by virtue of avoiding express advocacy, could solicit corporate contributions to pay for their electioneering activities." Brief for Defendants at 46, *McConnell*, 251 F. Supp. 2d. The Commission concluded that "by 2000, corporations, unions, and interest groups fully recognized that, through the trivial effort of avoiding express advocacy, they could make unrestricted and undisclosed expenditures to influence the outcome of federal elections while avoiding the reach of federal election law." *Id.* at 48.

Before the Supreme Court, the Commission characterized BCRA as "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime," because BCRA merely extended the reach of federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674). BCRA's sponsors made the same argument to the Court, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience.... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The Commission was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications" with enumerated examples. "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district." Brief for Appellees at 92, *McConnell*, 124 S. Ct. And, the Commission asserted, interest groups could still "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." *Id.* at 95 n.40. BCRA's sponsors agreed:

> [T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches billboards, yard signs, phone banks, and door-to-door campaign all fall outside its narrow scope, as do internal communications between a corporation or union and its stockholders or members.

Brief for Intervenor-Defendants at 158, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582).

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 632 (1988). And the administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress might have adopted but did not. Rather, post-*McConnell*, only a legislature may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to demonstrate that the additional restriction is not unconstitutionally vague and is narrowly tailored to serve the requisite governmental interest, as *McConnell* so found regarding "electioneering communications." *See Anderson v. Spear*, No. 02-5529, slip op. at 22 (6th Cir. Jan. 16, 2004).

In this respect, it is very much to the point that the *McConnell* majority opinion concluded with its observation that BCRA was unlikely to be "the last congressional statement on the matter" and "[w]hat problems will arise, and how Congress will respond, are concerns for another day." 124 S. Ct. at 232. At oral argument, the BCRA sponsors' counsel responded to a question posing the prospect that more money would be contributed to "independent, sometimes highly ideological groups" in place of now-banned soft money donations to the political parties, that if that occurred and "it turns out to be a phenomenon that creates corruption as this Court [has] defined it...Congress can take care of the problem." Transcript at 88-89, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674) (Sept. 8, 2003). While we hasten to say that independent groups' political activity and advocacy are not "problems" but essential aspects of a vigorous democracy, the point is clear that only the Congress has authority, subject to constitutional review, to restrict those endeavors further.

Furthermore, the Commission cannot define "expenditure" one way for a non-federal Section 527 account and another way for other organizations that are not political committees under

the Act. Since *Buckley*, as confirmed by *MCFL* and now *McConnell*, the scope of that term with respect to communications by *all* groups other than political committees has been express advocacy, so unions, corporations and incorporated Section 501(c) and non-federal 527 organizations have been compelled to undertake such communications only through connected federal political committees, if at all; and they have been able to use non-federal funds for other public communications referring to federal candidates – in the case of corporations and non-federal Section 527 organizations, with their regular treasuries, and in the case of unions and other Section 501(c) organizations, either their regular treasuries or, where Internal Revenue Code standards indicated that an adverse tax consequence could attach to regular treasury spending, with non-federal Section 527 separate segregated funds. Indeed, most recently, the IRS issued Rev. Rul. 2004-06 to describe various communications fact patterns in order to guide that choice for Section 501(c)(4), (5) and (6) organizations; but under the OGC draft, as to any such communication that could be said to Apromote, support, attack or oppose" a federal candidate (and many apparently could, given the OGC=s disposition of ABC=s proposed communications), the non-federal Section 527 separate segregated fund could *not* fund it, contrary to that revenue ruling, and the Section 501(c) organization could only make the expenditure" through a federal political committee. Even if this were properly subject to the Commission's regulatory process, it would be constrained at least to Aconsult and work together [with the IRS] to promulgate rules [and] regulations...that are mutually consistent." *See* 2 U.S.C. ∋ 438(f).

Improper Reliance on Advisory Opinion Process

Finally, even if the Commission did have the statutory authority to redefine "expenditure" as the OGC Draft proposes, it could not do so in an advisory opinion. Such a "rule of law" could be adopted "only as a rule or regulation pursuant to procedures established in section 438(d)," 2 U.S.C. § 437f(b), including "submission of the rule or regulation to the Congress" for its review and opportunity to intervene before it becomes effective. *See United States Defense Comm. v. FEC*, 861 F.2d 765, 771 (2d Cir. 1988). "General statements of tests and standards (other than those included in the FECA and our regulations) are inappropriate to the advisory opinion process because (1) this process is limited to specific events or transactions and (2) the Commission may enunciate rules of law which bind the regulated community only through regulations, not through advisory opinions." FEC Advisory Opinion 1999-11 (May 21, 1999) (Concurrence by Vice Chairman Wold and Commissioners Elliott and Mason). "Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method." FEC Audits of Dole for President Committee (June 24, 1999) (Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom). As

we have shown, such a rulemaking here would be an *ultra vires* act; so much more so if as an advisory opinion.

Communications: Promoting, Supporting, Attacking or Opposing Clearly Identified Candidates

In response to Questions 3 through 7, the OGC Draft concludes that various communications referring to a clearly identified federal candidate must be paid with all federal funds, no matter how or when the communication is made and even though the communication does not contain words of express advocacy.[5] Again, this would be a significant change in the law – an extension of the regulation of communications way beyond the actual change in the law made in BCRA.

Congress manifestly did not change the law affecting the financing of "issue ads" by non-party and non-candidate committees with federal and non-federal accounts. Only express advocacy communications and certain communications coordinated with a Federal candidate or party committee must be paid for exclusively with Federal funds. "Electioneering communications" must be paid for with Federal funds *or* with non-Federal funds, provided by individuals, if the entity is an unincorporated section 527 political organization and maintains those funds in a segregated account.

For political committees (as ABC purports to be), the rules in place prior to BCRA remain effective. The Court clearly recognized this to be the case, stating:

> As a practical matter, BCRA merely codifies the principles of the FEC allocation scheme while at the same time justifiably adjusting

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[5] The AOR poses these questions only on behalf of a political committee with both a federal and a non-federal account. It is troubling that the analysis leading to the conclusion that all Federal funds must be used is based on a re-write of the definition of "expenditure." If this same analysis is used to apply to organizations that are not Federal political committees, it would be a radical departure from the existing law and could lead to the conclusion that any organization that makes uncoordinated disbursements for communications that promote, support, attack or oppose a clearly identified Federal candidate even outside the time periods applicable to public communications and electioneering communications. If these disbursements are defined as "expenditures," then such an organization could become a Federal political committee once the amount of those disbursements reaches $1,000. This would be an extension of the law that can only be done by Congress.

> the formulas applicable to these activities in order to restore the efficacy of the FECA's longtime statutory restrictions – approved by the Court and eroded by the FEC's allocation regime – on contributions to state and local party committees for the purpose of influencing federal elections.

124 S. Ct. at 673-74. Here the Court referred to BCRA's prohibition on allocation altogether for certain Federal election activity, and also its revision of allocation procedures for state and local parties that raise and spend Levin monies for Federal election activity. Congress did not mandate any such prohibition or revision for non-express advocacy by non-party political committees and non-federal political organizations, except where such advertising would be coordinated with the candidate within the meaning of the Commission's revised coordination rules. Indeed, the Commission revised all of its rules pursuant to the statute on allocation, coordination and other issues affected by the new law, and nowhere did it seek to make the change that OGC advocates in its draft.

As discussed above, the *McConnell* Court did not authorize a change on the basis of its discussion of the inapposite case of state and local parties. The "promote, support, attack or oppose" standard was adopted for those specific entities alone, and when engaged in specific activities: for example, the language from the opinion cited by the OGC Draft at 2-3 – that the standard recognizes the federal election "influence" of certain activities – appears in *McConnell* only as an explanation of the restrictions on state and local party "public communications." *See* 124 S. Ct. at 675 n.64. Again, Congress chose to regulate advertising of this kind by state and local party committees and candidates, in the belief that it would otherwise become the natural focus of efforts by parties and federal candidates to circumvent the anti-corruption measures of the law targeted at them. There is no basis for an *ad hoc* extension of this analysis to nonparty committees, without regard to statutory construction or Congressional intent.

ABC is an unincorporated nonconnected political entity with a federal and a non-federal account. Other than the new rules applicable to "electioneering communications," none of the requirements and allowances of this committee's financing of public communications and generic voter drives, including the allocation rules, have changed in the wake of BCRA. Thus, the correct analysis of the questions posed by ABC regarding its proposed communications is as follows:

(1) Communications that refer to a clearly identified Federal candidate and either contain express advocacy or are coordinated with a Federal candidate or party committee within the meaning of 11 C.F.R. pt. 109 must be paid for by the ABC federal account.

(2) Broadcast communications that refer to a clearly identified Federal candidate that do not contain words of express advocacy and are not coordinated with a Federal candidate or party committee, made more than 30 days before a primary or 60 days before a general election, may be paid with funds from the ABC non-federal account (including corporate and labor funds).

(3) Broadcast communications that refer to a clearly identified Federal candidate that do not contain words of express advocacy and are not coordinated with a Federal candidate or party committee, made within 30 days of a primary or 60 days of a general election, must be paid for by the ABC federal account or from funds donated by individuals and maintained in segregated account containing only funds donated by individuals and not funds from corporations or labor organizations.

Communications: Express Advocacy

The OGC Draft concludes that communications that constitute "express advocacy" of a single federal candidate must be paid exclusively with federal funds, and that if such communications expressly advocate the election or defeat of more than one federal candidate, the costs must also be paid from federal funds only. We agree that this is a correct reading of the law. In addition, we agree with the General Counsel that a communication expressly advocating the election or defeat of a clearly identified federal candidate along with clearly identified nonfederal candidates, may be paid on an allocated basis pursuant to 11 C.F.R. § 106.1.

The General Counsel also advances the theory that a communication that expressly advocates the election of a clearly identified candidate, but also includes a ticketwide appeal for support of the "entire Republican team" must be paid only with federal funds. The OGC Draft does not clearly state the legal basis for this conclusion. In any event, this reading of the law does not follow from 11 C.F.R. § 106.1. That section requires "attribution" to clearly identified federal candidates, "according to the benefit reasonably expected to be derived." 11 C.F.R. § 106.1(a). While the regulation proceeds to provide examples where the benefit is apportioned among a number of clearly identified candidates, it does not specifically address the case under review here: support for a clearly identified candidate, together with a generic party appeal. By its terms, however, the rule focuses on the "benefit reasonably expected to be derived," which cannot be said to be the same in two different cases – that is, both where the candidate is the exclusive focus of the communication, and where the communication promotes both the candidate and the party on a ticket-wide basis. The OGC, by its interpretation, is precluding allocation of even a portion of the ad committed to a generic party appeal.

Neither Commission precedent nor Congress's choices in BCRA support this reading of section 106.1, and in particular the intent to exclude the use of an allocation for a portion of the ad that appeals for generic party support. As noted, the Supreme Court "codified" the pre-BCRA allocation scheme, except where it was specifically amended in the case of specific entitles engaged in specific communications. There is suggestion in BCRA or the legislative history that Congress intended to amend section 106.1 to support the reading adopted by OGC here, or even manifested an expectation that the section as it is currently written would be read as OGC proposes.

Communications: Fundraising

The OGC Draft addresses different types of fundraising communications, and as discussed below, accurately states the law in response to some questions, and inaccurately in response to others.

(1) Answers to Questions 15, 16, 17, 18 & 19, 20 & 21

The positions taken by the OGC Draft on all of these questions are clearly correct, in view of Advisory Opinions 2003-3 and 2003-36. Those advisory opinions made clear that, while a federal candidate or officeholder cannot solicit funds that are outside the limitations and prohibitions of the Act, 2 U.S.C. §441i(e)(1), a federal candidate or officeholder *may* attend and speak at fundraising events for a political committee's non-federal account, even though the event raises funds outside the limitations and prohibitions of the Act. Advisory Opinions 2003-3 and 2003-36 further stated that, if a federal candidate or officeholder actually makes a solicitation in connection with such an event, such a solicitation must include or be accompanied by a clear and conspicuous message indicating that the solicitor is only asking for funds that comply with the limitations and prohibitions of the Act. The answers provided in the OGC Draft are consistent with the rulings in these prior advisory opinions.

(2) Answer to Question 22

Question 22 raises the possibility that ABC will solicit funds for its non-federal account by "using the names of specific Federal candidates in solicitations that will convey ABC's support for or opposition to specific Federal candidates." OGC Draft at 28. Solicitations would be undertaken through a variety of means, using messages like those presented in Question 21, including, for example, "ABC supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we can support President Bush's agenda." *Id.*

The OGC Draft concludes that ABC could not solicit non-federal funds using such messages, on the grounds that if ABC solicits funds "by using the names of specific Federal candidates in a manner that will convey ABC's support for or opposition to specific Federal candidates, the funds raised will be contributions to ABC subject to the Act's contribution limits and source prohibitions." OGC Draft at 29. That conclusion is incorrect, for two reasons.

First, the draft's reliance on *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995), is entirely misplaced. Contrary to the suggestion in the draft, the court in that case actually held that contributions solicited for a non-profit organization were *not* subject to regulation under the Act *unless* they were earmarked for activities or communications that *expressly advocate* the election or defeat of a clearly identified candidate.

In *Survival Education Fund*, a non-profit organization had mailed a solicitation for contributions, specifically referencing the 1984 elections, and including an issues survey. The cover letter stated, among other things, that "Your views on the enclosed survey will help us understand and articulate the deep fears of the American people that a second Reagan term will bring new and unchecked nuclear arms escalation . . . an all-out U.S. war in Central America . . . and even more life threatening cuts in human services." 65 F.3d at 288. The Court held that the non-profit organization was an MCFL-type organization and therefore that, even if the solicitation language constituted express advocacy, the organization could spend funds outside the Act's prohibitions and limitations for this communication. The Court then held that this solicitation could be made subject to the disclaimer requirement of 2 U.S.C. §441d(a)(3) precisely *because* the contributions raised were indeed "targeted to the election or defeat of a clearly identified candidate for federal office." *Id.* at 295. The court explained that, in *Buckley*, the Supreme Court had held that a contribution "made for the purpose of influencing" a federal election would include, among other things, a contribution "earmarked for political purposes." *Id.* at 294 (quoting *Buckley*, 424 U.S. at 78). The court then explained what "earmarked for political purposes" would mean with reference to a solicitation for contributions:

> The only contributions "earmarked for political purposes" with which the *Buckley* court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA. Thus, *Buckley*'s definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions in §431(8)(A)(i), as applied to groups acting independently of any candidate or his agents and which are not "political committees".... Accordingly, *disclosure is only required* under §441d(a)(3) *for solicitations of contributions that are earmarked*

> *for activities or "communications that expressly advocate the election or defeat of a clearly identified candidate,'* ....

Survival Educ. Fund, 65 F.3d at 295 (quoting *Buckley*, 424 U.S. at 80) (emphasis added).

ABC's hypothetical language, "give so that we can support President Bush's agenda," does not remotely suggest that the contributions will be earmarked for communications expressly advocating President Bush's re-election. Therefore, such language could clearly be used by ABC in a solicitation of funds, not subject to the limits or prohibitions of the Act, to be deposited in ABC's non-federal account.

Second, it would be entirely inconsistent with the Commission's regulations even to permit, let alone require, ABC to deposit into its federal account funds resulting from the solicitation proposed by ABC. Under 11 C.F.R. §102.5(a)(2), a non-connected committee with federal and non-federal accounts cannot treat any contribution as federally-permissible unless it has been specifically designated for the federal account; results from a solicitation "which expressly states that the contribution will be used in connection with a federal election"; or is received from contributors who are informed that all contributions are subject to the limits and prohibitions of the Act. Significantly, in revising this regulation after the enactment of BCRA, the Commission specifically *eliminated* the provision creating a presumption that any solicitation by a party committee referencing a federal candidate or a federal election "shall be presumed to be for the purpose of influencing a federal election," such that resulting contributions would be automatically subject to the limits and prohibitions of the Act. *See* 11 C.F.R. §102.5(a)(3).[6]

The solicitation language proposed by ABC – "give so that we can support President Bush's agenda" – would actually be insufficient to allow ABC to deposit any resulting contributions

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[6] The OGC's reasoning on this point is also inconsistent with the advisory opinions recently issued to the Republican Governors Association (RGA), among others, that expressly allow federal candidates to appear, speak and be featured guests at fundraising events held to raise nonfederal funds. While the candidates are not allow to specifically "ask" that donors contribute such funds, they are otherwise allowed to support these events with their personal appearance and their remarks. These opinions demonstrate that there is simply no precedent for the statement that federal candidates cannot be featured in the solicitation of nonfederal, as well as federal, funds. Moreover, unlike in the case addressed by the OGC Draft, the candidates participating in the events sanctioned by the RGA and other opinions have expressly consented to the use of their appearance to raise soft money

in its federal account, because that language clearly does *not* expressly state "that the contribution will be used in connection with a federal election." *Id.* §102.5(a) (2)(ii). The purpose of this regulation is to ensure that contributors whose funds are place in the federal account "know the intended use of their contributions." Final Rule, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49073 (July 28, 2002). If language like that proposed by ABC – earmarking for issue advocacy but not express advocacy – is, under the Commission's rules, by definition insufficient to *inform* donors that their contributions will be used "for the purpose of influencing" a federal election, 11 C.F.R. §100.52(a), then it makes no sense to conclude that such mere issue-advocacy language *earmarks* the contribution for that purpose. Thus the Commission cannot rationally hold that such issue-advocacy language, referencing a federal candidate, automatically makes any resulting contributions subject to the Act's limitations and prohibitions.

For these reasons, the Commission should reject the OGC Draft's answer to Question 22 and hold that the proposed solicitation language *may* be used by ABC to solicit funds, not meeting the Act's prohibitions and limitations, to be deposited into ABC's non-federal account.

Generic Voter Drives and Other Activities Conducted Pursuant to 11 C.F.R. 106.6

The General Counsel, on pages 5-6 of the draft, correctly concludes that the allocation rules the Commission has promulgated in Part 106 of its regulations are still good law. The draft more specifically confirms, correctly, that messages that do not mention a clearly identified federal candidate may be paid on an allocated basis, even where those message are used in connection with a voter registration or GOTV drive conducted by a non-party political committee with a focus on issue or party identification.

In the wake of the *McConnell* decision, several commentators have argued that the Commission's allocation provisions are no longer valid. But it is not correct to say that Congress rejected allocation, or that the Supreme Court condemned such provisions as a means of "circumventing" the federal campaign laws. To the contrary, BCRA set forth a wholly new allocation scheme – applicable to the use of Levin funds for state and local party committee Federal election activity – while not addressing the FEC's existing allocation provisions. Moreover, as noted above, the Supreme Court was aware that the allocation rules in place prior to BCRA remained applicable to voter registration and GOTV activities before the Federal election activity period is triggered. *See* 124 S. Ct. at 696. Even if Congress could constitutionally overturn the FEC's allocation rules (with respect, for example, to political party advertising), Congress did not do so, and they cannot simply be read out of the Commission's regulations.

Coordination Among Non-Party Non-Candidate Organizations

The OGC Draft correctly notes that "neither the Act nor Commission regulations expressly address coordination [by a political committee] with a political committee and 527 political organization or 501(c)(3) organization." The conclusion that "ABC is not categorically prohibited from consulting with, or acting in concert with these other organizations" is consistent with the law.

Furthermore, there does not appear to be any basis for an attempt to restrict or otherwise limit such interactions. The FEC's coordination regulations apply to candidates and party committees, on the basis that their activities, if funded with soft money, present unique and constitutionally compelling dangers of corruption or its appearance. These considerations simply have no bearing on political organizations that do not coordinate with a candidate or political party. Where there is no coordination, there can be no corrupting influence. A prohibition or limitation on interactions between groups, regardless of their legal status, that are not coordinating their efforts with candidates or parties, is neither necessary nor constitutionally supportable.

Effect of Prior Contribution on "Coordination"

The General Counsel's draft concludes that a political committee's prior contribution to a federal candidate does not affect the analysis of coordination as it would apply to its subsequent activities, such as GOTV and voter registration. Similarly, a solicitation for funds for a voter registration or GOTV drive that also references a federal candidate does not require that all subsequent voter registration or GOTV efforts messages be paid with federal funds, where such subsequent messages do not reference a federal candidate.

This position is consistent with the position the Commission has taken with respect to independent expenditures – that the mere making of a contribution does not constitute coordination with a candidate. It is also consistent with the detailed provisions of the coordination regulations. Those rules do not support a conclusion that the making of a contribution alone satisfies any prong of the test for coordination.

This view is supported, by analogy, by the *McConnell* decision's striking as unconstitutional the requirement that party committees must choose in the general election between independent activity and coordinated activity. The Court made clear that a party may conduct both types of activity at the same time. *See* 124 S. Ct. at 700-01.

Criminal Penalties

The draft correctly notes that the Commission does not have the authority to impose criminal penalties, and, as a result, it properly declines to identify conduct that might be subject to them.

Foreign National Contributions

As noted in the draft, nothing in the Act or Commission regulations in any way creates an exception for political organizations such as ABC to solicit or receive contributions from foreign nationals. This broad prohibition clearly applies to political organizations that operate both federally and nonfederally.

Hypothetical Questions or Inadequate Information

The OGC Draft properly refuses to address certain speculative questions that cannot be accurately analyzed without specific facts. For example, the draft declines to address issues of coordination between ABC and candidates for Federal office or political party committees The draft's approach in this respect is the correct one.

Similarly, the Commission declines to address the activities of donors of nonfederal funds. As the General Counsel's draft notes, ABC's request "could implicate many third parties, who may find themselves in a wide variety of circumstances." Again, the application of the Commission regulations to hypothetical or speculative situations, which could result in severe results, should not be done lightly without an adequate basis in fact. The draft properly puts such questions aside until an appropriate request is received.

For these same reasons, the General Counsel's draft also correctly defers any analysis of the application of its agency regulations to various hypothetical questions posed by ABC. As cited in the draft, the Commission had earlier noted in its Explanation and Justification that its agency regulations would be difficult to apply "in the abstract." The consequences of a finding that someone is operating as an agent are severe and should not be addressed in an advisory opinion without clear, definitive facts that establish the grant of such agency.

Very truly yours,

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Rich Thomas <rthomas@ltsrlaw.com> on 02/04/2004 11:53:55 AM

Please respond to rthomas@ltsrlaw.com

To: mdove@fec.gov
cc:

Subject: Comments on Draft Advisory Opinion 2003-37

We are experiencing difficulty getting through on your fax. Attached are the joint comments of 324 organizations regarding Draft Advisory Opinion 2003-37.

Thank you.

Holly Schadler

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February 4, 2004

By Facsimile and Hand Delivery

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

The 324 undersigned environmental, civil rights, civil liberties, women's rights, public health, social welfare, senior, religious, and social justice organizations submit these comments on the General Counsel's draft of Advisory Opinion 2003-37 prepared in response to a request by Americans for a Better Country ("ABC"). For the reasons set forth below, we wish to express our profound concern over the broad scope of the draft opinion, both as it applies to federal political committees and as it appears to reach the educational, advocacy and voter participation activities of nonfederal political organizations and other nonprofit corporations. There is no authority under the Commission's regulations, the Federal Election Campaign Act ("FECA") or the Supreme Court's recent opinion in *McConnell v. FEC* to regulate these activities in the manner suggested in the draft opinion.

The organizations signing this letter are organized as nonprofit corporations under state law and are exempt from federal income taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code ("Code"). Several organizations operate as qualified nonprofit corporations under 11 C.F.R. § 114.10. A number of the signatories have established separate segregated funds that are registered with the Commission as political committees; many also maintain nonfederal political organizations established under IRC section 527(e)(3) that are not registered with the Commission. The common interest among all of these organizations is that we regularly seek to educate the public and to advocate positions on progressive legislative and policy issues, including the positions taken by federal officeholders with respect to these issues.

If the draft opinion is adopted as proposed by the General Counsel, the result may be that we could no longer conduct these activities unless we raise and spend funds in accordance with the source and contribution limitations of the FECA. For most of our organizations, raising funds under these restrictions would be impossible. For those organizations represented here that are exclusively organized under IRC section 501(c)(3), we are not permitted under federal tax law to establish or maintain a separate segregated fund to engage in political activity. Therefore,

this opinion would entirely shut down many of the advocacy activities of our organizations. As 501(c)(3) and 501(c)(4) organizations, we are funded by large and small donors. Most of the undersigned organizations could not exist without the large grants and contributions from foundations, corporations and individuals that are prohibited under FECA. See 2 U.S.C. § 441a and 441b. Even those of us that operate federal political committees are able to raise relatively small amounts from our members for these purposes - amounts that could never support the extensive educational and advocacy programs we have conducted for many years. In any event these limited contributions are desperately needed to support our political programs as required by law. We therefore urge the Commission, with the greatest sense of urgency and in the strongest terms possible, not to issue the draft opinion in its present form.

Discussion

Although numerous aspects of the draft opinion are extremely troublesome, we are most concerned by the opinion's proposed reworking and expansion of the definition of "expenditures" in FECA § 431(9) to include any communication that "promotes, supports, attacks, or opposes" a candidate for federal office. While the facts of the current request concern a nonconnected political committee, by adopting this analysis the opinion can be read to extend to independent issue groups as well. As nonprofit corporations, the vast majority of us are flatly prohibited by FECA § 441b from making any "contribution or expenditure in connection with any election to any political office." Because we frequently refer to federal officeholders and candidates in our communications with the general public, and do so in a manner that may be highly critical of the officeholders' positions on issues, the proposed redefinition of "expenditures" would cause many of our currently lawful communications to become unlawful corporate expenditures.

Just in the past few months, for example, the organizations represented here have criticized Congress' and the Administration's policies and actions concerning such issues as tax cuts for the rich, Medicare and prescription drugs, oil exploration in the Arctic, nominations to the federal judiciary, abuses of civil liberties in connection with the war on terror, and numerous other issues. There is little doubt, we fear, that these communications would be perceived both by our opponents, who are constantly looking for ways to handcuff our efforts on behalf of our causes, and, based on the reasoning of this draft, by the Commission itself, as "opposing", or even "attacking," President Bush and other federal officeholders. This is the case even though these communications have not identified Mr. Bush or any other officeholder as a candidate for re-election, referred to the November 2004 election, or otherwise urged or implied opposition to the President's or any other individual's candidacy.

These communications have been aimed, not at these individuals as candidates, but as current officeholders in an attempt to influence legislation and public policy. Making it unlawful to criticize the policies and actions of a sitting President or Members of Congress except under the auspices of a registered political committee is one of the most fundamental attacks on the freedom of speech and freedom of association of American citizens ever contemplated by a governmental agency.

The proposed definition of "expenditures" is nowhere to be found in section 441b, even

though it is the only provision of federal election law governing contributions and expenditures by nonprofit corporations such as those represented here. Under the Supreme Court's decisions in *Buckley v. Valeo* and *Massachusetts Citizens For Life v. FEC*, section 441b was authoritatively construed to prohibit corporate communications that expressly advocate the election or defeat of clearly identified candidates. We have relied on this long-standing interpretation and have fully complied with it in all of our educational and advocacy programs. In passing the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress restricted certain limited broadcast communications, but it did nothing to modify the express advocacy test as applied to communications in other forms of media or even to broadcast communications disseminated outside of BCRA's 30/60 day black-out periods.

In redefining "expenditures," the draft opinion relies on the Supreme Court's recent decision in *McConnell v. FEC*, that upheld the constitutionality of BCRA's provisions limiting, and in some case prohibiting, political party committees from using nonfederal funds to support communications that "promote, support, attack or oppose" federal candidates. But, these restrictions are contained in a separate provision of BCRA, 2 U.S.C. § 441i, that applies exclusively to political parties and no other organization or entity. Most importantly, Congress did not amend the provisions applicable to corporations in a similar manner, nor did it revise the statutory definition of "expenditures" as proposed in the draft opinion.[1] The Commission has no authority to enact a new standard for corporate communications when Congress itself chose not to do so.[2]

The extent to which the draft advisory opinion reaches far beyond Congress' intent is also demonstrated by recent legislation governing so-called "527" or "soft-money" political

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[1] The proponents of BCRA created the new restrictions on "electioneering communications" at least in part due to a recognition of the limits of the express advocacy test. Faced with numerous court decisions limiting express advocacy to the so-called "magic words," Congress attempted to regulate a narrow set of broadcast communications through the bright-line test created in the definition of "electioneering communications." In doing so, Congress clearly understood the constitutional difficulty faced in its task, demonstrated by the back-up definition in the event that Supreme Court rejected the bright-line test. It seems unlikely that Congress would have thought the electioneering communications provisions necessary if the Commission had the authority to unilaterally expand the express advocacy test.

[2] Furthermore, even if the Commission had such authority, it is prohibited from adopting a new substantive rule of election law in an advisory opinion. *See* 2 U.S.C. § 437f(b). Instead, the FECA provides that the Commission may only adopt rules through the administrative process, including notice and an opportunity for public comment and Congressional review. *See* 2 U.S.C. § 438(d). Should the Commission undertake such a rule-making to address the issue of nonprofit corporate communications in the future, we are confident that we could demonstrate that educational and advocacy activities of nonprofit corporations do not present the risk of corruption or appearance of corruption as the Supreme Court found with regard to political parties. Unlike the parties, we operate entirely independently of federal officeholders and candidates, which, under BCRA, are even severely limited in the manner in which they may raise funds for nonprofit organizations. *See* 2 U.S.C. § 441i(d).

organizations. Even prior to BCRA, Congress considered the operation of these organizations and concluded that, in the interest of greater public disclosure, they should register and file reports with the Internal Revenue Service. *See* Pub.L. 106-230, 114 Stat. 477 (July 1, 2000), codified at I.R.C. §§ 527(i)-(j). In 2002, shortly after it enacted BCRA, Congress again considered the disclosure obligations for these organizations and amended the registration and reporting requirements to ease the burden on some of the organizations covered by the 2000 amendments. *See* Pub.L. 107-276, 116 Stat. 1929 (Nov. 2, 2002). In neither instance, however, did Congress outlaw 527 political organizations or even authorize the IRS to curtail their activities. Furthermore, in ruling on the constitutionality of BCRA, the Supreme Court expressly noted that despite the Act's limitations on the fundraising abilities of political parties, "interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." *McConnell v. FEC*, 540 U.S. _____ at _____ [slip op. at 80]. This plain reading of the statute is inconsistent with the approach of the proposed advisory opinion. If the Commission adopts the ABC opinion as drafted, it would be to appropriate to itself authority which Congress has twice refused to provide.

The draft opinion is also inconsistent with the Commission's own rulemaking excluding section 501(c)(3) organizations from the ban on electioneering communications. Several months ago, the Commission recognized the need to limit the scope of BCRA's prohibition on 501(c)(3) organizations to protect advocacy communications by these groups:

> The Commission believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their nature, do not do.

Final Rules and Explanation and Justification, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002)

Based on this draft opinion, it appears the Commission is prepared to consider denying all 501(c) organizations the ability to engage in this "highly desirable and beneficial activity." Even if this conclusion is not mandated by the terms of the opinion itself, it is the logical conclusion based on the reasoning set forth here.

Recent IRS guidance, in stark contrast to the position set forth in the draft opinion, confirms that 501(c) organizations are permitted to continue their advocacy activities, including attempts to influence legislative and administrative actions, throughout an election year. *See* Rev. Rul. 2004-6. These communications may in some cases oppose the position of an officeholder, who is also a candidate, in a manner that could be deemed, under the broad language of the General Counsel's draft, to "support" or "attack" a candidate for federal office. Nevertheless, the IRS ruled that such communications, under the circumstances described in the ruling, are consistent with the exempt purposes of a 501(c) organization and would not subject them to tax or jeopardize their exempt status.

While we have focused on the impact of the draft opinion on nonprofit organizations' educational and advocacy activities, we are also concerned about how the opinion would

handcuff our ability to undertake voter participation activities such as voter registration and get-out-the-vote, especially among minority and other under-represented communities. In response to question 8 of the opinion, the draft proposes that voter registration and GOTV public communications that do not expressly advocate, but "promote, support, attack or oppose" a federal candidate, must be paid entirely with federally permissible funds. Therefore, a nonprofit organization that informs the public that President Bush and his Administration has permitted corporations to increase harmful mercury emissions and encourages individuals to register to vote would be required to pay for this activity with federal funds. The regulations at section 114.4 state only that voter registration conducted by a corporation must not contain express advocacy or be coordinated with a candidate or political party. The Commission has no authority to broaden the restriction placed on these voter participation activities.

We would like to address two other aspects of the draft opinion, which cause equally deep concerns. First, the draft opinion states that any fundraising communications that "support, promote, attack or oppose" a federal candidate must be paid for with federally permissible funds and may only raise funds subject to the federal source and contribution limits. Unlike other portions of the opinion, this language is not even arguably limited to the nonconnected PAC making this request but applies to any solicitation. Thus, it appears that a fundraising letter from our organizations that appeals for contributions to "fight against President Bush's policies that threaten to undermine effective international family planning" would be subject to this requirement. The effect of such a conclusion is staggering. In addition to soliciting contributions, fundraising communications provide another critical avenue for reinforcing and generating public support for our advocacy messages. We, and other nonprofit organizations like us, would be required to choose to forgo either the messages that inform our supporters about the public policy debate or the funds that are vital to our existence. There is no legal basis for imposing this restraint on the broader nonprofit community.

Finally, the draft opinion proposes to extend the prohibition on foreign national contributions to *any* organizations that engage in voter registration, get-out-the-vote and other activities in connection with a federal, state or local election for public office as well as ballot measures. Many of our 501(c) organizations conduct these activities. For some of us, these activities comprise a major part of our program; others engage in these activities only as the need arises related to a specific policy objective or program. Our ability to continue to engage in these activities would be threatened if we were required to screen all of our contributions to determine whether or not they were made by a foreign national as defined under the FECA. The Commission, even in its own rulemakings on foreign national contributions, has never suggested that there is a need to extend the coverage of this provision to all nonprofit organizations that conduct voter participation activities. Such an intrusion would have a severe impact on these nonpartisan activities that are vital to fostering civic participation.

Conclusion

This draft opinion poses an unprecedented threat to the advocacy and educational activities of the undersigned organizations as well as many organizations that are not represented. We respectfully urge the Commission to reject this draft in its current form.

Respectfully submitted,

Alliance for Justice
Leadership Conference on Civil Rights
League of Conservation Voters
NAACP National Voter Fund
NARAL Pro-Choice America
Planned Parenthood Federation of America
People For the American Way
Sierra Club

ACCESS, Inc.
ACCESS/Women's Health Rights Coalition
Adams County Citizens Alliance
Adequate Housing for Missourians
Advancement Project
AIDS Alabama
AIDS Foundation of Chicago
AIDS Action
AIDS Action Baltimore, Inc.
AIDS Institute
AIDS Legal Council of Chicago
AIDS Treatment Data Network
AIDS ReSearch Alliance
Albany Advocacy Center
Albuquerque Mental Health
Housing Coalition, Inc.
Arlington Community Temporary Shelter
Alliance of Cleveland HUD Tenants
Alliance for Better Housing
Alliance for Healthy Homes
Alliance for Retired Americans
American Association of University Women
American Friends Service Committee
Americans for Democratic Action
American Planning Association
Amnesty International USA
Aurora Project, Inc.
Appleseed Community Mental Health Center, Inc.
Assistance Fund
Asian & Pacific Islander American Health Forum
Association of Asian Pacific Community Health Organizations
Association for Neighborhood & Housing Development
Bailey House
Bethany House Services in Cincinnati
Bethlehem Haven
Brattleboro Area Affordable Housing Corporation
Bread and Roses Community Fund
Bronx AIDS Services
Cabell-Huntington Coalition for the Homeless
Cancer Action
CAP Services, Inc.
Capital District African American Coalition on AIDS
Catholic Charities AIDS Services
Catholics for a Free Choice
Catholic Health Initiatives
Center for American Progress
Center for Housing Policy
Center for Impact Research
Center for Law and Social Policy
Center for Responsible Lending
Center for Women and Families
Central City Concern
Central City Development Council, Inc.
CHAMP
Charlotte County Homeless Coalition, Inc.
Chicago Community Development Corporation
Chicago Jobs Council
Choice USA
CitiWide Harm Reduction
Citizens Housing Coalition
Citizens' Housing and Planning Association
Clermont Counseling Center
Cleveland Tenants Organization
Cleveland Housing Network
CNY Environmental Institute, Inc.
Coalition for the Homeless, Inc.
Coalition on Homelessness and Housing in Ohio
Coalition to Stop Gun Violence
Columbus Coalition for the Homeless
CommonBond Communities
Community Coordinated Child Care (4-C)
Community Partners for Affordable Housing, Inc.
Community Stabilization Project
Community Toolbox for Children's Environmental Health
Connecticut AIDS Residence Coalition, Inc.
Connecticut Housing Coalition
Corporation for Supportive Housing
Cooperative Services Inc.
Contoocook Housing Trust
Corporation for Supportive Housing
Crossroads Urban Center
Cumberland Court Housing Commission, Inc.
Dane Fund
Davidson Housing Coalition
Disabled Action Committee
Domus Transitional Housing of St. Cloud Minnesota
Earthjustice
East Bay Asian Local Development Corporation

East Bruinswick Community Housing Corporation
East Metro Women's Council
Eden Housing, Inc.
Episcopal Diocese of Ohio
Equinox
Fairmount Housing Corporation
Fairness in Rural Lending
Family Services of King County
Fayetteville Urban Ministry
Feminist Majority
Florida Coalition for the Homeless
Florida Housing Coalition
Florida Non-Profit Housing, Inc.
Food Finders
Fordham Bedford Housing Corporation
Friends Committee on National Legislation
Friends of the Earth
Friends of Midcoast Maine
Friends of Youth
Frontier Housing
Gay Men's Health Crises
Genesis Community Loan Fund
Goodhue County Habitat for Humanity
Grand Valley Housing Initiatives
Greater Metropolitan Housing Corporation of the Twin Cities
Greater Syracuse Tenants Network
Greene County Fair Housing
Harm Reduction Coalition
Health and Disability Advocates
HEARTH
HELP
Hepatitis Education Project
HOME Line
Homeless and Housing Coalition of Kentucky
Homes for Families
Housing Alliance of Pennsylvania
Housing & Community Development Network of New Jersey
Housing Development Consortium of Seattle – King County
Housing Development Corporation
Housing Preservation Project
Housing Resources Group
Illinois Drug Education and Legislative Reform
ICAN, Inc.
Inglewood Neighborhood Housing Services
Interfaith Housing of Western Maryland
Interdependent Living Solutions Center
Improving Kids' Environment
Jefferson Behavioral Health System
Jewish Community Action
J-Linch Inc.
King County Coalition Against Domestic Violence
Latino Commission on AIDS
Lawyers' Committee for Civil Rights Under Law
Learning Disabilities Association of Washington
Lifelong AIDS Alliance
Los Angeles Housing Partnership, Inc.
Low Income Investment Fund
Lutheran Social Services of Southern California
Maine Lead Action Project
Maxfield Research Inc.
McKinley Towers Tenant Association
Mercy Housing California
Mercy Housing, Inc.
Mercy Services Corporation
Metropolitan Boston Housing Partnership
Metropolitan Housing Coalition
Metropolitan Interfaith Council on Affordable Housing
Metropolitan Tenants Organization
Mi Casa, Inc.
Mid-Minnesota Legal Assistance
Minnesota Coalition for the Homeless
Minnesota Housing Partnership
Montpelier Housing Task Force
Montrose Clinic
Nashville CARES
National Abortion Federation
National AIDS Housing Coalition
National Alliance of HUD Tenants
National American Indian Housing Coalition
National Congress for Community Economic Development
National Council of Jewish Women
National Family Planning and Reproductive Health Association
National Housing Conference
National Housing Law Project
National Low Income Housing Coalition
National Low Income Housing Policy Center
National Organization for

Women
National Organization for Women Foundation
National Partnership for Women & Families
Native American Rights Fund
Neighborhood Development Services, Inc.
Neighborhood Housing Services of Fort Worth and Tarrant County, Inc.
Neighborhood Housing Services of Waterbury, Inc.
New Home Development Company, Inc.
New Housing Opportunities, Inc.
Nevada Shakespeare Company
Non-Profit Housing Association of Northern California
Northeast Missouri Client Council for Human Needs, Inc.
Northeast Ohio Coalition for the Homeless
North Carolina Coalition To End Homelessness
Northwoods Wilderness Recovery
NOW Legal Defense and Education Fund
NRDC Action Fund
Office of Rural & Farmworker Housing
Ohio Association of Second Harvest Foodbanks
Older Women's League
OMB Watch
Oregon Housing and Community Services
Organ Health Forum
Otero Arts Concil
Restart Inc.
Partnership Center, Ltd.
Partners In Active Living Through Socialization, Inc.
Philadelphia Association of Community Development Corporations
Physicians for Social Responsibility
Planned Parenthood
Population Action International
Presbyterian Church (USA), Washington Office
Project H.O.M.E.
Provincetown AIDS Support Group
Psychiatric Rehabilitation Services, Inc.
Religious Coalition for Reproductive Choice
Religious Coalition for Reproductive Choice Educational Fund
Residents for Affordable Housing
Rhode Island Coalition for the Homeless
Rhode Island Public Housing Tenants Association
Rock River Valley Mental Health Association
Rogers Park Community Action Network
Roots of Mankind Corp.
RPJ Housing
Rural California Housing Corporation
SAGE
San Diego Housing Federation
San Francisco AIDS Foundation
Scott County Housing Council
Sierra Club
Sisters of Mercy of the Americas Regional Community of Chicago
Society for Equal Access
Society of St. Vincent de Paul, Council of Louisville, Inc.
Southern California Association of Non-Profit Housing
Stopping Woman Abuse Now
Staten Island AIDS Task Force
Suburban Essex Housing Development Corp.
The Home Connection
Title II Community AIDS National Network
TransAfrica Forum
Treatment Action Group
TuscoBus, Inc.
United Ministries
United Pennsylvanians
Utah HUD Tenants Association
Utah Progressive Network
Utah SOS 8 Coalition
Virginia Housing Coalition
Virginia Housing Coalition Information Service
Wake Housing and Homeless Coalition
Washington Defender Association's Immigration Project
Washington's Action for New Directions
Washington Association of Churches
Washington Low Income Housing Alliance
Wellspring
West Hollywood Community Housing Corporation
West Central MN Housing Partnership
Western States Center
Westgate Housing Inc.

Westmoreland Human Opportunities, Inc.
White Earth Investment Initiative
Wilderness Society
Will-Grundy Center for Independent Living
Wisconsin Citizen Action
Wisconsin Partnership for Housing Development, Inc.
YouthLink
Greater Upstate Law Project
New York AIDS Coalition
Amethyst, Inc.
Virginia Housing Development Authority
Institute for Caregiver Education
FACES of Stark County, Inc.
Lutheran Social Services of Illinois
Center for Health and Gender Equity
National Womens Law Center
Boston Community Loan Fund
Chemical Sensitivity Disorders Association
Citizens for Elderly Services, Inc.
National Latina/o Lesbian, Gay, Bisexual & Transgender Organization
South Side Office of Concern
National Law Center on Homelessness & Poverty
Citizen Action/Illinois
VIDA/SIDA
Housing Virginia Campaign, Inc.
National Housing Institute
Center for Civil Justice
Community Housing Coordinators
Statewide Housing Action Coalition
The November Coalition
Northwoods Wilderness Recovery
Ohio Empowerment Coalition
Tennessee Fair Housing Council
Jewish Alliance for Law and SocialAction
The Advocacy for the Poor
Trinity Services, Inc. of Joliet, IL
FreeStore/FoodBank Inc.
Environmental Working Group
AIDS Treatment Activists Coalition
St. Vincent DePaul Society, Dayton District Council
Coalition of Citizens With Disabilities in Illinois
The Christian Community Action Coalition – Addictions Outreach Ministry Inc.
Northwestern Housing Enterprises, Inc.
American Civil Liberties Union
Welfare Law Center
North Carolina Community Action Association
South Westerly Tenants Organization
P.A.L. Mission
Community Development Law Center
AIDS Alliance for Children, Youth and Families
Neighborhood Housing Services of Asheville, NC, Inc.
National Community Capital Association
Cleveland Diocesan Social Action Office
Chenango Housing Improvement Program, Inc.
The Other Place
Environmental Health Watch
Mississippi Center for Justice
The Brady Campaign to Prevent Gun Violence United with the Million Mom March
Latino Commission on AIDS, New York, NY
Unitarian Universalist Service Committee Delaware Valley
The I Am Your Child Foundation
Women Employed, Chicago, IL
Housing Rights, Inc.
Just Harvest, A Center for Action Against Hunger, Pittsburgh, PA
Institute for Policy Studies, Paths for the 21st Century Project

cc: Office of General Counsel
Chairman Bradley A. Smith
Vice Chair Ellen L. Weintraub
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner
Jonathan Levin, Esq.

February 4, 2004

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Draft Advisory Opinion 2003-37

Dear Mr. Norton:

Democracy 21, the Campaign Legal Center and the Center for Responsive Politics hereby provide comments on the general counsel's draft of Advisory Opinion 2003-37, requested by Americans for a Better Country (ABC). The organizations submitting these comments also filed initial comments, dated December 17, 2003, on the same advisory opinion request.

1. The draft advisory opinion correctly concludes that "expenditures" by a "political committee" are not limited to "express advocacy" or "electioneering communications" for purposes of FECA. The general counsel's draft opinion correctly determines that public communications by ABC that promote, support, attack or oppose a federal candidate are accordingly "for the purpose of influencing" a federal election, and are therefore "expenditures" under the Act that must be funded with hard money.

In so holding, the general counsel correctly rejects the argument that an "express advocacy" test applies as a limiting construction to determine when spending by a political committee constitutes an "expenditure." This conclusion is compelled by the reasoning of the Supreme Court in both *Buckley v.* Valeo, 424 U.S. 1 (1976), and in *McConnell v. FEC,* 540 U.S. __, 124 S.Ct. 619 (2003). The draft correctly states that in *McConnell,* "the Supreme Court clarified that the so-called 'express advocacy' test is not a constitutional barrier limiting the interpretation of what is 'for the purpose of influencing any Federal election,' which is the operative term used in the definition of 'expenditure' in 2 U.S.C. 431(9)." Draft AO at 2.

This is incontestably correct. Moreover, the Court made clear as early as the *Buckley* decision that the "express advocacy" standard does not apply in the case of spending by a political committee, which the Court defined as a group whose "major purpose" is to influence candidate elections. Such entities are not subject to the concerns

of vagueness in drawing a line between pure issue discussion and electioneering activities, because these groups are in the business of influencing candidate elections. Accordingly, their expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley, supra* at 79. The Court reaffirmed this position in *McConnell*, 124 S.Ct. at 675 n.64.

Indeed, the same reasoning applies not just to federal political committees, but to any section 527 organization. Groups that are organized under section 527 of the Internal Revenue Code are "political organizations" that, by IRS definition, are operated "primarily" for the purpose of influencing candidate elections. The tax code defines "political organizations" to mean any group "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). An "exempt function" in turn means the "function of influencing or attempting to influence" the election of an individual to public office. *Id.* at (e)(2).

Thus, any section 527 organization is a group whose "major purpose" is to influence candidate elections, as the Supreme Court has used that term in making clear that such organizations are not subject to the "express advocacy" standard. This means that the "express advocacy" standard is not applicable in determining whether expenditures by a section 527 organization are "for the purpose of influencing" federal elections and covered by federal campaign finance laws.

As the Supreme Court noted in *McConnell*, "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 124 S.Ct. at 678, n.67. The Court said that they "by definition engage in partisan political activity." *Id.* at 679.

For this reason, the Court's explanation in *Buckley* and *McConnell* that the campaign finance laws are not limited by the "express advocacy" test when applied to groups which "are, by definition, campaign related" encompasses all section 527 organizations, not just federal political committees.[1]

Thus, for organizations that have a major purpose to influence candidate elections – including ABC and any other "political committee" or section 527 organization – the concerns about vagueness which require a bright line test to separate electioneering from non-electioneering activity simply do not apply.

In such cases, the statutory standard to define an "expenditure" is spending "for the purpose of influencing an election," without any narrowing "express advocacy" construction to address vagueness concerns.

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[1] On the other hand, this analysis is not applicable to entities which are not under the control of a candidate or which do not have a major purpose to influence candidate elections. *See infra* at Section 6.

The Commission has in the past construed this standard by reference to whether a communication contained an "electioneering message." *See, e.g.*, Advisory Opinions 1984-15, 1985-14, 1995-25. The Commission mistakenly abandoned that test in its review of the 1996 presidential campaign activities, and erroneously replaced it, as a practical matter, with an "express advocacy" standard.[2]

Although BCRA adopted the "promote, support, attack or oppose" standard in the specific context of determining whether public communications by state parties are "federal election activities," 2 U.S.C. § 431(20)(A)(iii), the same standard is, as the draft advisory opinion notes, "equally appropriate as the benchmark for determining whether communications made by political committees must be paid for with Federal funds. By their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections." Draft AO at 3.

Just as the Commission previously had employed the "electioneering message" test as a means of construing and applying the statutory standard of "expenditure," the "promote, support, attack or oppose" test appropriately serves the same purpose. As the draft notes, the Court found this test sufficiently clear and explicit for purposes of regulating the activities of political organizations with a major purpose of influencing candidate elections. *See McConnell,* 124 S.Ct. at 675, n.64 ("The words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision."). The general counsel correctly identifies, and applies, this test to the activities of ABC in the draft advisory opinion.[3]

2. The draft advisory opinion incorrectly fails to conclude that ABC is a federal political committee in its entirety. The draft advisory opinion fails to address an important issue presented by the facts of the request as to whether ABC in its entirety, including both its federal account and non-federal accounts, should be deemed to be a federal political committee, thus subject to the contribution limits, source prohibitions and reporting requirements of the law.[4]

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[2] *See* Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom on the Audits of Dole for President, *et al.* (June 24, 1999).

[3] For reasons we discuss below, a section 527 organization such as ABC whose overriding purpose is to influence federal elections is required to pay for its disbursements solely with hard money, and cannot be permitted to allocate its expenditures between hard and soft money, a system that in the past allowed the unfettered flow of soft money into federal elections.

[4] Although our initial comments on this AOR did not address this "political committee" issue, the question has now been brought to the foreground by the Commission's recent decision to issue a Notice of Proposed Rulemaking on the definition of "political committees" under FECA.

ABC states in its request letter that it is "an unincorporated, independent political committee organized under Section 527 of the Internal Revenue Code." Advisory Op. Request Letter of November 18, 2003 at 1. The request further notes, however, that ABC "maintains a federal account and several non-federal accounts in which it segregates large individual contributions from contributions from corporations, unions and trade associations." *Id.*

Thus, the request makes clear that ABC has both a federally registered political committee which raises hard money, as well as one or more non-federal accounts which raise soft money.

The request also makes clear, however, that ABC as a whole has a major purpose, indeed an overriding purpose, to influence federal elections. The request states unmistakably the central purpose of ABC: "For both fundraising and political purposes, ABC wishes to state in a press release announcing its launch that its purpose is to reelect President Bush and defeat the Democratic nominee." *Id.* (emphasis added). ABC subsequently restates its central purpose as one to influence federal elections:

> Aimed at the general public, ABC will conduct an independent massive get-out-the-vote operation with non-federal "soft" dollars that it wishes to aid President Bush's re-election, the defeat of the eventual Democratic Presidential nominee, and the election of Republican candidates to the United States Senate and House...
>
> ABC plans to concentrate its activities in 17 or 18 states which are likely to be battleground states in the 2004 presidential election as well as a number of states and congressional districts to be determined as they become battlegrounds for control of the U.S. Senate and House.
>
> *Id.* at 5 (emphasis added)

The analysis in the general counsel's draft response proceeds on the basis of assuming that a political organization registered under section 527 of the Internal Revenue Code, such as ABC, can maintain both federal and non-federal accounts, and can allocate its expenditures for certain activities between those accounts, even when the overriding purpose of the organization is to influence federal elections. This premise is fundamentally flawed.

ABC has made clear that its purpose as a whole is to elect or defeat particular federal candidates. This is as true of the ABC's "non-federal" accounts as it is of its federal "political committee" account.[5] Thus, the purportedly "nonfederal" accounts of

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[5] Thus, for instance, ABC asks whether "non-federal soft dollar donors to the massive voter mobilization effort directed at the general public with the stated purpose...of defeating a named federal candidate" are in violation of the Act. Request

ABC must themselves be treated as federal political committees and must comply with the contribution limits, source prohibitions and reporting requirements of the law.

In other words, money being raised and spent for the purpose of influencing a federal election cannot evade federal law simply by being funneled through an account that is denominated as "nonfederal."

The FEC has the responsibility to look at the reality of a section 527 organization's purpose and operations. Where the facts and circumstances make clear that a section 527 organization is raising and spending money, as a whole, for the overriding purpose of influencing federal elections, the 527 organization as a whole must be treated as a federal political committee. The fiction of allocation must not be allowed for such a group. Otherwise, the FEC will be repeating its mistakes of the past and, in the words of the Supreme Court, "subvert[ing]" the federal campaign finance laws,. *McConnell,* 124 S.Ct. at 660.

The Federal Election Campaign Act defines a "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). In *Buckley*, the Supreme Court construed this term "to only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986), the Court again invoked this test, and stated that when a group's independent spending activities "become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."

In *FEC v. GOPAC,* 917 F.Supp. 851, 859 (D.D.C. 1996), a single district court narrowed this "major purpose" test by restricting it to organizations whose "major purpose" is "the nomination or election of a particular candidate or candidates for federal office." Although we believe this decision was erroneous – and that the Commission was wrong not to appeal the decision[6] – even under its ruling, ABC as a whole should be deemed to be a political committee.

The request letter makes clear that ABC's overriding purpose is to influence the election or defeat of particular federal candidates, principally the election of President Bush and the defeat of the Democratic nominee for president. As noted above, ABC frankly states that "its purpose is to re-elect President Bush and defeat the Democratic

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Letter at 9. This makes clear that ABC's voter mobilization efforts, and the soft money raised for those efforts, are principally intended to influence federal elections.

[6] *See* Statement for the Record of Vice Chairman McGarry and Commissioners McDonald and Thomas in *FEC v. GOPAC* (March 21, 1996).

nominee." This statement of its overriding purpose could not be plainer. Given this purpose, and given the incontestable fact that ABC has spent or will spend $1,000 in "expenditures," ABC as a whole meets even the most restrictive definition of a "political committee." Accordingly, ABC should be required to register all of its section 527 accounts with the Commission as political committees, and to abide by the contribution limits and source prohibitions applicable to federal political committees. We believe this result is the proper interpretation of the statute.[7]

3. The draft advisory opinion incorrectly allows ABC to allocate expenditures between its federal and non-federal accounts. In failing to analyze whether ABC is a federal "political committee" as a whole, the draft advisory opinion incorrectly assumes that ABC may maintain one or more non-federal accounts, and may allocate expenditures between the federal and non-federal accounts for certain activities which, in the general counsel's opinion, influence both federal and non-federal elections.

Such allocation is the same approach which, when applied to party committees, allowed a massive flow of soft money into federal elections, and which was sharply criticized by the Supreme Court in *McConnell* as the means to "subvert" the law.

The virtually unrestricted flow of soft money through the political parties into federal elections was made possible by the Commission's allocation rules, which the Supreme Court described as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." *McConnell*, 124 S.Ct. at 660, n. 44. The Court found that the FECA "was subverted by the creation of the FEC's allocation regime," *id.*, which allowed the parties "to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* at 660. The Court flatly stated that the Commission's allocation rules "invited widespread circumvention" of the law. *Id.* at 661.

There is no legitimate justification for applying allocation rules to a section 527 organization, such as ABC, which has an overriding purpose of influencing federal elections. Such an approach would fundamentally undermine the contribution limitations and source prohibitions of federal campaign finance law and make a mockery of the Supreme Court's stern critique of allocation in *McConnell*.

For this reason, the draft is incorrect in applying the 11 CFR Part 106 allocation regulations to ABC's activities, including both its public communications that support or oppose both federal and non-federal candidates, and its disbursements for generic voter drive activities.

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[7] While ABC should be treated as a federal political committee as a whole, and thus all of its receipts should be "contributions" under FECA, we also agree with the conclusion of the general counsel that the funds raised in response to solicitations by a section 527 organization that convey support for or opposition to a federal candidate are "contributions" subject to the contribution limits and source prohibitions of the law. Draft AO at 28-29.

4. The Commission's current allocation rules for non-connected committees, including section 527 organizations, are wrong, can lead to absurd results and if left in place will once again invite widespread circumvention of the law. For the reasons set forth above, a section 527 organization which has an overriding purpose of influencing federal elections should not be permitted to allocate expenditures.

The draft opinion states that the allocation formula at 11 C.F.R. § 106.6 would apply "[w]here specific candidates are not clearly identified and the communication is part of a generic voter drive." AO Draft at 5.[8]

According to 11 C.F.R. § 106.6(c)(1), the allocation ratio for generic voter drive activity by a non-connected organization is based on the ratio of the committee's expenditures on behalf of specific federal candidates to its total disbursements for specific federal and non-federal candidates (not including overhead or other generic costs) during the two-year federal election cycle.

This allocation approach can readily be "gamed" in order to work absurd results that will, for instance, allow funding of generic partisan voter mobilization activity to influence federal elections with *entirely* soft money.

Under the existing regulations, if a non-connected political committee made a single small disbursement on behalf of a specific nonfederal candidate, but does not undertake *any* expenditures on behalf of specific federal candidates, this allocation formula would permit the committee to pay for unlimited generic voter drive activity *entirely* with soft money since it will have no expenditures "on behalf of specific federal candidates." This is true even if the explicit purpose of the of the committee and its donors is to elect or defeat federal candidates.

That a political organization whose overriding purpose is to influence federal elections could use exclusively soft money to finance voter mobilization drives urging voters to "Get out and vote Republican on Election Day" is an absurd result. In *McConnell*, the Supreme Court emphasized that generic campaign activity confers "substantial benefits on federal candidates." 124 S.Ct. at 675. These activities *should* be funded entirely with federal funds. But the Part 106 regulations potentially allow them instead to be funded entirely with non-federal funds, thereby turning the intent of the law upside-down.[9]

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[8] Under 11 C.F.R. § 106.6(b)(2)(iii), "[g]eneric voter drives" include "voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate."

[9] A different allocation formula under 11 C.F.R. § 106.1 would apply to public communications that promote both specific federal and specific non-federal candidates. This regulation would require allocation between ABC's federal and non-federal accounts according to the "benefit reasonably expected to be derived" by the clearly

If the Commission sanctions the approach followed by the general counsel and allows non-connected committees to allocate partisan generic voter drive activities to influence federal elections under the fundamentally flawed section 106.6 formulae, it will be licensing an egregious variant of the allocation fiction that was at the heart of the soft money loophole, and was fully discredited by the Supreme Court in *McConnell*. It will be re-creating the soft money system in federal elections.

As a result, it is essential in the forthcoming rulemaking on the definition of "political committee" that the Commission address the closely related issue of allocation for non-connected committees. The Commission must determine whether such allocation is permissible at all, and to the extent any allocation is allowed by Commission, the Commission must ensure that the allocation is not a vehicle for authorizing the free flow of soft money back into federal elections.

5. **The draft advisory opinion fails to disapprove ABC's scheme to serve as a conduit for the indirect use of corporate funds to finance partisan voter drive activity.** In our initial comments on this AOR, we pointed out that FECA prohibits "any direct or indirect payment" by a corporation (or labor union) in connection with any federal election. 2 U.S.C. § 441b(b)(2) (emphasis added). Corporations (and unions) are barred from using their treasury funds to conduct partisan voter mobilization activities aimed at the general public and in connection with a federal election. *E.g.* 11 C.F.R. § 114.4(d).

The advisory opinion request makes clear that ABC will raise corporate funds for its nonfederal accounts, and it seeks permission to spend those funds on an allocated basis for such partisan generic voter mobilization activities. In approving such allocation under the Part 106 regulations, the general counsel's draft has incorrectly ignored the

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identified federal and non-federal candidates. *Id.* at § 106.1(a). For example, the draft indicates that in the case of a communication expressly advocating the election of three clearly identified candidates, two federal and one non-federal, "a reasonable allocation would require that two-thirds of the cost be paid with funds from the federal account." AO Draft at 17.

In so doing, the draft AO misapplies section 106.1 to this communication. The time-space allocation method of section 106.1 for a printed communication requires the Commission to examine the entire communication, and attribute the space used to the respective candidates. The message in paragraph 5 would state: "George Bush and the Republican team have made the United States safer. On November 2, vote for George W. Bush for President, X for U.S. Senate, and Y for Governor." Consistent with the draft opinion's conclusion regarding paragraph 57 (p. 17, lines 7-9), the first sentence of this communication must be attributed entirely to the only named candidate – President Bush – and must be included in determining the allocation ratio for the communication. Allocating the entire communications using the two-thirds to one-third ratio completely and erroneously disregards the first sentence.

statutory prohibition on the "indirect" use of corporate funds to influence federal elections.

To allow section 527 organizations to raise corporate (or union) funds and then spend those funds for partisan voter drive activity aimed at the general public simply allows the use of corporate (or union) money to fund indirectly what such money cannot be used to fund directly, in direct contravention of section 441b. The general counsel's draft fails to address this point, much less provide any justification for the proposed spending under the law.

6. The draft advisory opinion applies the "promote, support" test only to section 527 organizations, including political committees. The test is not intended to and does not apply to section 501(c) non-profit groups. It is our understanding that a number of section 501(c) nonprofit organizations will argue to the Commission that it should reject the general counsel's draft because it purports to apply the "promote, support, attack or oppose" test to determining when a nonprofit corporation is making a prohibited "expenditure" under section 441b of FECA.

This argument is wrong and should be rejected.

The general counsel's discussion of the "promote, support" test is explicitly limited to the communications by political committees:

> Nevertheless the promote, support, attack or oppose standard is equally appropriate as the benchmark for determining whether communications made by political committees must be paid for with Federal funds. By their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections.
>
> Draft AO at 3 (emphasis added)

Nothing in the opinion purports to apply this standard to section 501(c) nonprofit corporations. The opinion makes no reference at all to such groups, and provides no basis for concluding that it would be applicable to such groups.

Public communications by 501(c) groups are subject to federal hard money rules under section 441b if they meet the "electioneering communications" provisions of BCRA (i.e., they are broadcast ads that refer to a federal candidate and are aired within 30 days of a primary or 60 days of a general election),[10] if they contain "express advocacy" outside of those pre-election periods, or if they are coordinated with federal candidates or political parties.

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[10] This is subject to the exemption from the definition of "electioneering communications" for section 501(c)(3) groups, wrongly established by a Commission rule. 11 C.F.R. § 100.29(c)(6).

There is nothing in the draft advisory opinion to indicate that any effort is being made to change these rules.

The "promote, support, attack or oppose" standard proposed in the advisory opinion draft for determining when federal political committees make "expenditures" is not intended to apply, and does not apply, to section 501(c) groups.

The general counsel never claims that the opinion's application of a "promote, support" standard to construe the term "expenditure" should apply to any primarily non-political organization, including section 501(c)(3), (c)(4), (c)(5) or (c)(6) groups – none of which can, under the tax laws, have a "major purpose" to influence federal elections. All such groups have long been subject to the "express advocacy" test, and now under BCRA, they are subject to the "electioneering communication" rules as well. There is no effort being made in the advisory opinion to extend this coverage.

To say that the draft advisory opinion may mean that *any* communication by a section 501c group that mentions a federal candidate supportively or critically must be funded out of a PAC is wrong as a matter of law and an incorrect interpretation of the draft opinion.

We appreciate the opportunity to submit these comments.

Respectfully,

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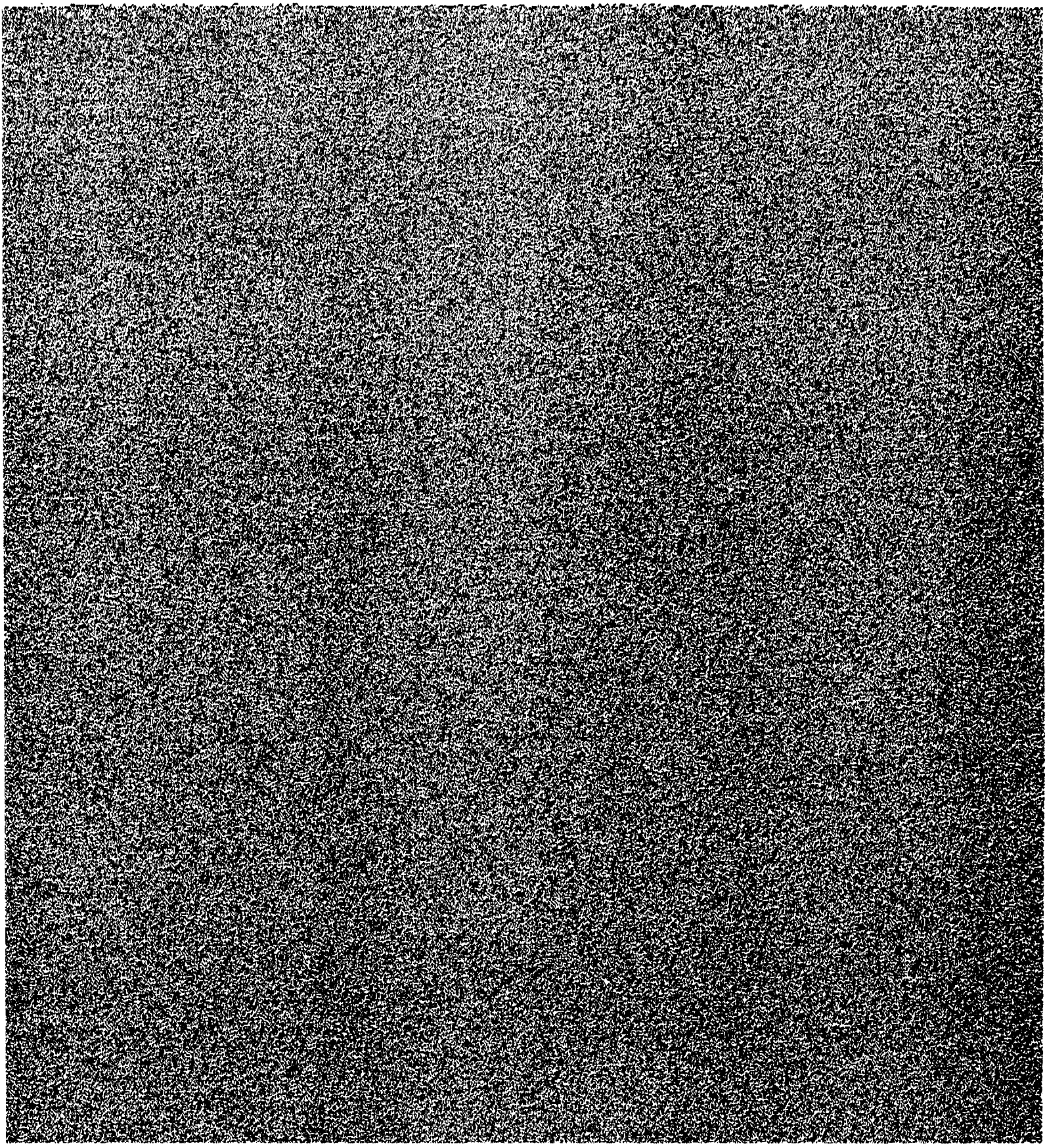

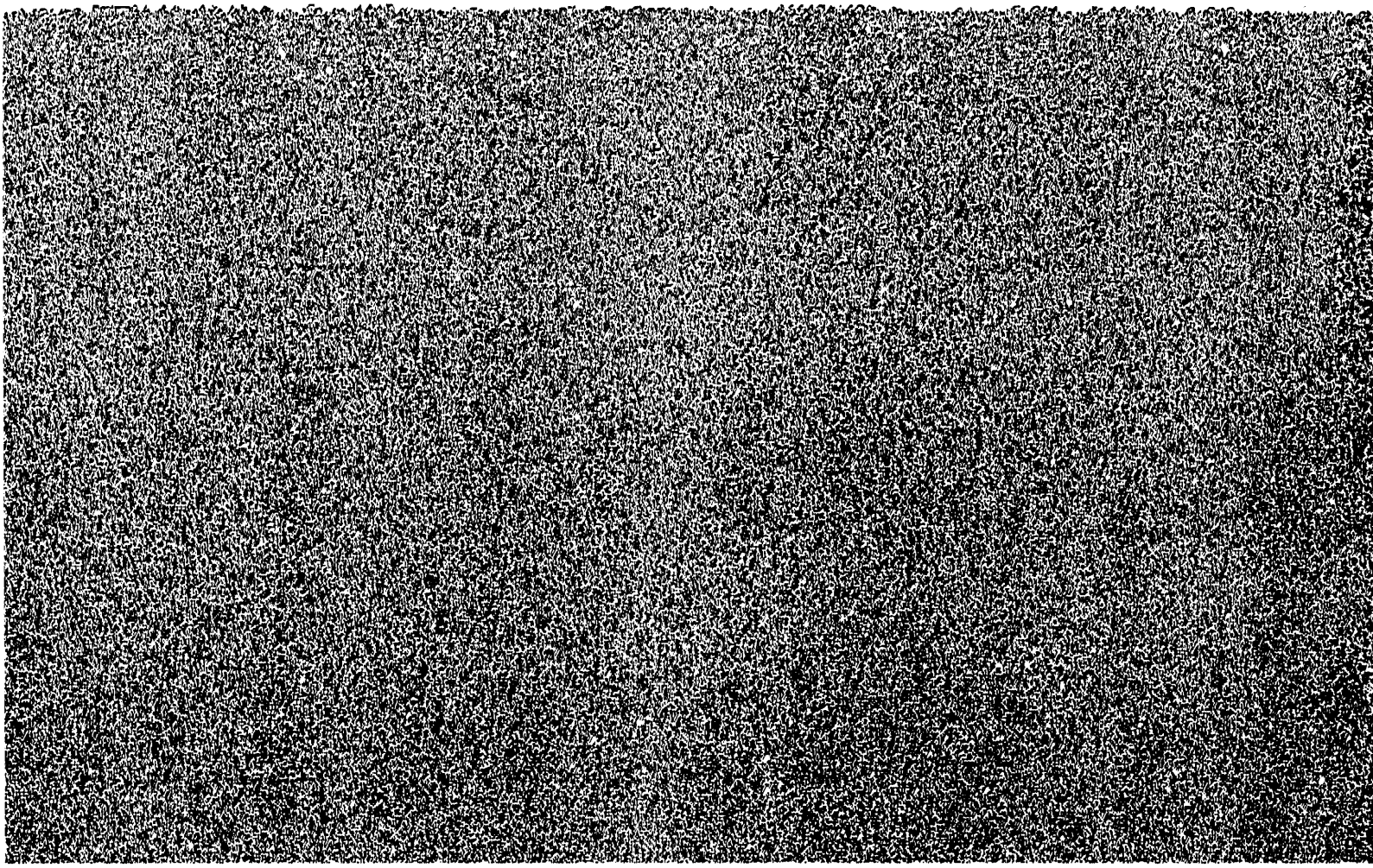

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Comments to Draft Advisory Opinion 2003-37.

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February 4, 2004

By Facsimile and Hand Delivery

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

The 324 undersigned environmental, civil rights, civil liberties, women's rights, public health, social welfare, senior, religious, and social justice organizations submit these comments on the General Counsel's draft of Advisory Opinion 2003-37 prepared in response to a request by Americans for a Better Country ("ABC"). For the reasons set forth below, we wish to express our profound concern over the broad scope of the draft opinion, both as it applies to federal political committees and as it appears to reach the educational, advocacy and voter participation activities of nonfederal political organizations and other nonprofit corporations. There is no authority under the Commission's regulations, the Federal Election Campaign Act ("FECA") or the Supreme Court's recent opinion in *McConnell v. FEC* to regulate these activities in the manner suggested in the draft opinion.

The organizations signing this letter are organized as nonprofit corporations under state law and are exempt from federal income taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code ("Code"). Several organizations operate as qualified nonprofit corporations under 11 C.F.R. § 114.10. A number of the signatories have established separate segregated funds that are registered with the Commission as political committees; many also maintain nonfederal political organizations established under IRC section 527(e)(3) that are not registered with the Commission. The common interest among all of these organizations is that we regularly seek to educate the public and to advocate positions on progressive legislative and policy issues, including the positions taken by federal officeholders with respect to these issues.

If the draft opinion is adopted as proposed by the General Counsel, the result may be that we could no longer conduct these activities unless we raise and spend funds in accordance with the source and contribution limitations of the FECA. For most of our organizations, raising funds under these restrictions would be impossible. For those organizations represented here that are exclusively organized under IRC section 501(c)(3), we are not permitted under federal tax law to establish or maintain a separate segregated fund to engage in political activity. Therefore,

this opinion would entirely shut down many of the advocacy activities of our organizations. As 501(c)(3) and 501(c)(4) organizations, we are funded by large and small donors. Most of the undersigned organizations could not exist without the large grants and contributions from foundations, corporations and individuals that are prohibited under FECA. See 2 U.S.C. § 441a and 441b. Even those of us that operate federal political committees are able to raise relatively small amounts from our members for these purposes - amounts that could never support the extensive educational and advocacy programs we have conducted for many years. In any event these limited contributions are desperately needed to support our political programs as required by law. We therefore urge the Commission, with the greatest sense of urgency and in the strongest terms possible, not to issue the draft opinion in its present form.

Discussion

Although numerous aspects of the draft opinion are extremely troublesome, we are most concerned by the opinion's proposed reworking and expansion of the definition of "expenditures" in FECA § 431(9) to include any communication that "promotes, supports, attacks, or opposes" a candidate for federal office. While the facts of the current request concern a nonconnected political committee, by adopting this analysis the opinion can be read to extend to independent issue groups as well. As nonprofit corporations, the vast majority of us are flatly prohibited by FECA § 441b from making any "contribution or expenditure in connection with any election to any political office." Because we frequently refer to federal officeholders and candidates in our communications with the general public, and do so in a manner that may be highly critical of the officeholders' positions on issues, the proposed redefinition of "expenditures" would cause many of our currently lawful communications to become unlawful corporate expenditures.

Just in the past few months, for example, the organizations represented here have criticized Congress' and the Administration's policies and actions concerning such issues as tax cuts for the rich, Medicare and prescription drugs, oil exploration in the Arctic, nominations to the federal judiciary, abuses of civil liberties in connection with the war on terror, and numerous other issues. There is little doubt, we fear, that these communications would be perceived both by our opponents, who are constantly looking for ways to handcuff our efforts on behalf of our causes, and, based on the reasoning of this draft, by the Commission itself, as "opposing", or even "attacking," President Bush and other federal officeholders. This is the case even though these communications have not identified Mr. Bush or any other officeholder as a candidate for re-election, referred to the November 2004 election, or otherwise urged or implied opposition to the President's or any other individual's candidacy.

These communications have been aimed, not at these individuals as candidates, but as current officeholders in an attempt to influence legislation and public policy. Making it unlawful to criticize the policies and actions of a sitting President or Members of Congress except under the auspices of a registered political committee is one of the most fundamental attacks on the freedom of speech and freedom of association of American citizens ever contemplated by a governmental agency.

The proposed definition of "expenditures" is nowhere to be found in section 441b, even

though it is the only provision of federal election law governing contributions and expenditures by nonprofit corporations such as those represented here. Under the Supreme Court's decisions in *Buckley v. Valeo* and *Massachusetts Citizens For Life v. FEC*, section 441b was authoritatively construed to prohibit corporate communications that expressly advocate the election or defeat of clearly identified candidates. We have relied on this long-standing interpretation and have fully complied with it in all of our educational and advocacy programs. In passing the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress restricted certain limited broadcast communications, but it did nothing to modify the express advocacy test as applied to communications in other forms of media or even to broadcast communications disseminated outside of BCRA's 30/60 day black-out periods.

In redefining "expenditures," the draft opinion relies on the Supreme Court's recent decision in *McConnell v. FEC*, that upheld the constitutionality of BCRA's provisions limiting, and in some case prohibiting, political party committees from using nonfederal funds to support communications that "promote, support, attack or oppose" federal candidates. But, these restrictions are contained in a separate provision of BCRA, 2 U.S.C. § 441i, that applies exclusively to political parties and no other organization or entity. Most importantly, Congress did not amend the provisions applicable to corporations in a similar manner, nor did it revise the statutory definition of "expenditures" as proposed in the draft opinion.[1] The Commission has no authority to enact a new standard for corporate communications when Congress itself chose not to do so.[2]

The extent to which the draft advisory opinion reaches far beyond Congress' intent is also demonstrated by recent legislation governing so-called "527" or "soft-money" political

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[1] The proponents of BCRA created the new restrictions on "electioneering communications" at least in part due to a recognition of the limits of the express advocacy test. Faced with numerous court decisions limiting express advocacy to the so-called "magic words," Congress attempted to regulate a narrow set of broadcast communications through the bright-line test created in the definition of "electioneering communications." In doing so, Congress clearly understood the constitutional difficulty faced in its task, demonstrated by the back-up definition in the event that Supreme Court rejected the bright-line test. It seems unlikely that Congress would have thought the electioneering communications provisions necessary if the Commission had the authority to unilaterally expand the express advocacy test.

[2] Furthermore, even if the Commission had such authority, it is prohibited from adopting a new substantive rule of election law in an advisory opinion. *See* 2 U.S.C. § 437f(b). Instead, the FECA provides that the Commission may only adopt rules through the administrative process, including notice and an opportunity for public comment and Congressional review. *See* 2 U.S.C. § 438(d). Should the Commission undertake such a rule-making to address the issue of nonprofit corporate communications in the future, we are confident that we could demonstrate that educational and advocacy activities of nonprofit corporations do not present the risk of corruption or appearance of corruption as the Supreme Court found with regard to political parties. Unlike the parties, we operate entirely independently of federal officeholders and candidates, which, under BCRA, are even severely limited in the manner in which they may raise funds for nonprofit organizations. *See* 2 U.S.C. § 441i(d).

organizations. Even prior to BCRA, Congress considered the operation of these organizations and concluded that, in the interest of greater public disclosure, they should register and file reports with the Internal Revenue Service. *See* Pub.L. 106-230, 114 Stat. 477 (July 1, 2000), codified at I.R.C. §§ 527(i)-(j). In 2002, shortly after it enacted BCRA, Congress again considered the disclosure obligations for these organizations and amended the registration and reporting requirements to ease the burden on some of the organizations covered by the 2000 amendments. *See* Pub.L. 107-276, 116 Stat. 1929 (Nov. 2, 2002). In neither instance, however, did Congress outlaw 527 political organizations or even authorize the IRS to curtail their activities. Furthermore, in ruling on the constitutionality of BCRA, the Supreme Court expressly noted that despite the Act's limitations on the fundraising abilities of political parties, "interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." *McConnell v. FEC*, 540 U.S. _____ at _____ [slip op. at 80]. This plain reading of the statute is inconsistent with the approach of the proposed advisory opinion. If the Commission adopts the ABC opinion as drafted, it would be to appropriate to itself authority which Congress has twice refused to provide.

The draft opinion is also inconsistent with the Commission's own rulemaking excluding section 501(c)(3) organizations from the ban on electioneering communications. Several months ago, the Commission recognized the need to limit the scope of BCRA's prohibition on 501(c)(3) organizations to protect advocacy communications by these groups:

> The Commission believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their nature, do not do.

Final Rules and Explanation and Justification, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002)

Based on this draft opinion, it appears the Commission is prepared to consider denying all 501(c) organizations the ability to engage in this "highly desirable and beneficial activity." Even if this conclusion is not mandated by the terms of the opinion itself, it is the logical conclusion based on the reasoning set forth here.

Recent IRS guidance, in stark contrast to the position set forth in the draft opinion, confirms that 501(c) organizations are permitted to continue their advocacy activities, including attempts to influence legislative and administrative actions, throughout an election year. *See* Rev. Rul. 2004-6. These communications may in some cases oppose the position of an officeholder, who is also a candidate, in a manner that could be deemed, under the broad language of the General Counsel's draft, to "support" or "attack" a candidate for federal office. Nevertheless, the IRS ruled that such communications, under the circumstances described in the ruling, are consistent with the exempt purposes of a 501(c) organization and would not subject them to tax or jeopardize their exempt status.

While we have focused on the impact of the draft opinion on nonprofit organizations' educational and advocacy activities, we are also concerned about how the opinion would

handcuff our ability to undertake voter participation activities such as voter registration and get-out-the-vote, especially among minority and other under-represented communities. In response to question 8 of the opinion, the draft proposes that voter registration and GOTV public communications that do not expressly advocate, but "promote, support, attack or oppose" a federal candidate, must be paid entirely with federally permissible funds. Therefore, a nonprofit organization that informs the public that President Bush and his Administration has permitted corporations to increase harmful mercury emissions and encourages individuals to register to vote would be required to pay for this activity with federal funds. The regulations at section 114.4 state only that voter registration conducted by a corporation must not contain express advocacy or be coordinated with a candidate or political party. The Commission has no authority to broaden the restriction placed on these voter participation activities.

We would like to address two other aspects of the draft opinion, which cause equally deep concerns. First, the draft opinion states that any fundraising communications that "support, promote, attack or oppose" a federal candidate must be paid for with federally permissible funds and may only raise funds subject to the federal source and contribution limits. Unlike other portions of the opinion, this language is not even arguably limited to the nonconnected PAC making this request but applies to any solicitation. Thus, it appears that a fundraising letter from our organizations that appeals for contributions to "fight against President Bush's policies that threaten to undermine effective international family planning" would be subject to this requirement. The effect of such a conclusion is staggering. In addition to soliciting contributions, fundraising communications provide another critical avenue for reinforcing and generating public support for our advocacy messages. We, and other nonprofit organizations like us, would be required to choose to forgo either the messages that inform our supporters about the public policy debate or the funds that are vital to our existence. There is no legal basis for imposing this restraint on the broader nonprofit community.

Finally, the draft opinion proposes to extend the prohibition on foreign national contributions to *any* organizations that engage in voter registration, get-out-the-vote and other activities in connection with a federal, state or local election for public office as well as ballot measures. Many of our 501(c) organizations conduct these activities. For some of us, these activities comprise a major part of our program; others engage in these activities only as the need arises related to a specific policy objective or program. Our ability to continue to engage in these activities would be threatened if we were required to screen all of our contributions to determine whether or not they were made by a foreign national as defined under the FECA. The Commission, even in its own rulemakings on foreign national contributions, has never suggested that there is a need to extend the coverage of this provision to all nonprofit organizations that conduct voter participation activities. Such an intrusion would have a severe impact on these nonpartisan activities that are vital to fostering civic participation.

Conclusion

This draft opinion poses an unprecedented threat to the advocacy and educational activities of the undersigned organizations as well as many organizations that are not represented. We respectfully urge the Commission to reject this draft in its current form.

Respectfully submitted,

Alliance for Justice
Leadership Conference on Civil Rights
League of Conservation Voters
NAACP National Voter Fund
NARAL Pro-Choice America
Planned Parenthood Federation of America
People For the American Way
Sierra Club

ACCESS, Inc.
ACCESS/Women's Health Rights Coalition
Adams County Citizens Alliance
Adequate Housing for Missourians
Advancement Project
AIDS Alabama
AIDS Foundation of Chicago
AIDS Action
AIDS Action Baltimore, Inc.
AIDS Institute
AIDS Legal Council of Chicago
AIDS Treatment Data Network
AIDS ReSearch Alliance
Albany Advocacy Center
Albuquerque Mental Health Housing Coalition, Inc.
Arlington Community Temporary Shelter
Alliance of Cleveland HUD Tenants
Alliance for Better Housing
Alliance for Healthy Homes
Alliance for Retired Americans
American Association of University Women
American Friends Service Committee
Americans for Democratic Action
American Planning Association
Amnesty International USA
Aurora Project, Inc.
Appleseed Community Mental Health Center, Inc.
Assistance Fund
Asian & Pacific Islander American Health Forum
Association of Asian Pacific Community Health Organizations
Association for Neighborhood & Housing Development
Bailey House
Bethany House Services in Cincinnati
Bethlehem Haven
Brattleboro Area Affordable Housing Corporation
Bread and Roses Community Fund
Bronx AIDS Services
Cabell-Huntington Coalition for the Homeless
Cancer Action
CAP Services, Inc.
Capital District African American Coalition on AIDS
Catholic Charities AIDS Services
Catholics for a Free Choice
Catholic Health Initiatives
Center for American Progress
Center for Housing Policy
Center for Impact Research
Center for Law and Social Policy
Center for Responsible Lending
Center for Women and Families
Central City Concern
Central City Development Council, Inc.
CHAMP
Charlotte County Homeless Coalition, Inc.
Chicago Community Development Corporation
Chicago Jobs Council
Choice USA
CitiWide Harm Reduction
Citizens Housing Coalition
Citizens' Housing and Planning Association
Clermont Counseling Center
Cleveland Tenants Organization
Cleveland Housing Network
CNY Environmental Institute, Inc.
Coalition for the Homeless, Inc.
Coalition on Homelessness and Housing in Ohio
Coalition to Stop Gun Violence
Columbus Coalition for the Homeless
CommonBond Communities
Community Coordinated Child Care (4-C)
Community Partners for Affordable Housing, Inc.
Community Stabilization Project
Community Toolbox for Children's Environmental Health
Connecticut AIDS Residence Coalition, Inc.
Connecticut Housing Coalition
Corporation for Supportive Housing
Cooperative Services Inc.
Contoocook Housing Trust
Corporation for Supportive Housing
Crossroads Urban Center
Cumberland Court Housing Commission, Inc.
Dane Fund
Davidson Housing Coalition
Disabled Action Committee
Domus Transitional Housing of St. Cloud Minnesota
Earthjustice
East Bay Asian Local Development Corporation

East Bruinswick Community Housing Corporation
East Metro Women's Council
Eden Housing, Inc.
Episcopal Diocese of Ohio
Equinox
Fairmount Housing Corporation
Fairness in Rural Lending
Family Services of King County
Fayetteville Urban Ministry
Feminist Majority
Florida Coalition for the Homeless
Florida Housing Coalition
Florida Non-Profit Housing, Inc.
Food Finders
Fordham Bedford Housing Corporation
Friends Committee on National Legislation
Friends of the Earth
Friends of Midcoast Maine
Friends of Youth
Frontier Housing
Gay Men's Health Crises
Genesis Community Loan Fund
Goodhue County Habitat for Humanity
Grand Valley Housing Initiatives
Greater Metropolitan Housing Corporation of the Twin Cities
Greater Syracuse Tenants Network
Greene County Fair Housing
Harm Reduction Coalition
Health and Disability Advocates
HEARTH
HELP
Hepatitis Education Project
HOME Line
Homeless and Housing Coalition of Kentucky
Homes for Families
Housing Alliance of Pennsylvania
Housing & Community Development Network of New Jersey
Housing Development Consortium of Seattle – King County
Housing Development Corporation
Housing Preservation Project
Housing Resources Group
Illinois Drug Education and Legislative Reform
ICAN, Inc.
Inglewood Neighborhood Housing Services
Interfaith Housing of Western Maryland
Interdependent Living Solutions Center
Improving Kids' Environment
Jefferson Behavioral Health System
Jewish Community Action
J-Linch Inc.
King County Coalition Against Domestic Violence
Latino Commission on AIDS
Lawyers' Committee for Civil Rights Under Law
Learning Disabilities Association of Washington
Lifelong AIDS Alliance
Los Angeles Housing Partnership, Inc.
Low Income Investment Fund
Lutheran Social Services of Southern California
Maine Lead Action Project
Maxfield Research Inc.
McKinley Towers Tenant Association
Mercy Housing California
Mercy Housing, Inc.
Mercy Services Corporation
Metropolitan Boston Housing Partnership
Metropolitan Housing Coalition
Metropolitan Interfaith Council on Affordable Housing
Metropolitan Tenants Organization
Mi Casa, Inc.
Mid-Minnesota Legal Assistance
Minnesota Coalition for the Homeless
Minnesota Housing Partnership
Montpelier Housing Task Force
Montrose Clinic
Nashville CARES
National Abortion Federation
National AIDS Housing Coalition
National Alliance of HUD Tenants
National American Indian Housing Coalition
National Congress for Community Economic Development
National Council of Jewish Women
National Family Planning and Reproductive Health Association
National Housing Conference
National Housing Law Project
National Low Income Housing Coalition
National Low Income Housing Policy Center
National Organization for

Women
National Organization for Women Foundation
National Partnership for Women & Families
Native American Rights Fund
Neighborhood Development Services, Inc.
Neighborhood Housing Services of Fort Worth and Tarrant County, Inc.
Neighborhood Housing Services of Waterbury, Inc.
New Home Development Company, Inc.
New Housing Opportunities, Inc.
Nevada Shakespeare Company
Non-Profit Housing Association of Northern California
Northeast Missouri Client Council for Human Needs, Inc.
Northeast Ohio Coalition for the Homeless
North Carolina Coalition To End Homelessness
Northwoods Wilderness Recovery
NOW Legal Defense and Education Fund
NRDC Action Fund
Office of Rural & Farmworker Housing
Ohio Association of Second Harvest Foodbanks
Older Women's League
OMB Watch
Oregon Housing and Community Services
Organ Health Forum
Otero Arts Concil
Restart Inc.
Partnership Center, Ltd.
Partners In Active Living Through Socialization, Inc.
Philadelphia Association of Community Development Corporations
Physicians for Social Responsibility
Planned Parenthood
Population Action International
Presbyterian Church (USA), Washington Office
Project H.O.M.E.
Provincetown AIDS Support Group
Psychiatric Rehabilitation Services, Inc.
Religious Coalition for Reproductive Choice
Religious Coalition for Reproductive Choice Educational Fund
Residents for Affordable Housing
Rhode Island Coalition for the Homeless
Rhode Island Public Housing Tenants Association
Rock River Valley Mental Health Association
Rogers Park Community Action Network
Roots of Mankind Corp.
RPJ Housing
Rural California Housing Corporation
SAGE
San Diego Housing Federation
San Francisco AIDS Foundation
Scott County Housing Council
Sierra Club
Sisters of Mercy of the Americas Regional Community of Chicago
Society for Equal Access
Society of St. Vincent de Paul, Council of Louisville, Inc.
Southern California Association of Non-Profit Housing
Stopping Woman Abuse Now
Staten Island AIDS Task Force
Suburban Essex Housing Development Corp.
The Home Connection
Title II Community AIDS National Network
TransAfrica Forum
Treatment Action Group
TuscoBus, Inc.
United Ministries
United Pennsylvanians
Utah HUD Tenants Association
Utah Progressive Network
Utah SOS 8 Coalition
Virginia Housing Coalition
Virginia Housing Coalition Information Service
Wake Housing and Homeless Coalition
Washington Defender Association's Immigration Project
Washington's Action for New Directions

Washington Association of Churches
Washington Low Income Housing Alliance
Wellspring
West Hollywood Community Housing Corporation
West Central MN Housing Partnership
Western States Center
Westgate Housing Inc.

Westmoreland Human Opportunities, Inc.
White Earth Investment Initiative
Wilderness Society
Will-Grundy Center for Independent Living
Wisconsin Citizen Action
Wisconsin Partnership for Housing Development, Inc.
YouthLink
Greater Upstate Law Project
New York AIDS Coalition
Amethyst, Inc.
Virginia Housing Development Authority
Institute for Caregiver Education
FACES of Stark County, Inc.
Lutheran Social Services of Illinois
Center for Health and Gender Equity
National Womens Law Center
Boston Community Loan Fund
Chemical Sensitivity Disorders Association
Citizens for Elderly Services, Inc.
National Latina/o Lesbian, Gay, Bisexual & Transgender Organization
South Side Office of Concern
National Law Center on Homelessness & Poverty
Citizen Action/Illinois
VIDA/SIDA
Housing Virginia Campaign, Inc.
National Housing Institute
Center for Civil Justice
Community Housing Coordinators
Statewide Housing Action Coalition
The November Coalition
Northwoods Wilderness Recovery
Ohio Empowerment Coalition
Tennessee Fair Housing Council
Jewish Alliance for Law and SocialAction
The Advocacy for the Poor
Trinity Services, Inc. of Joliet, IL
FreeStore/FoodBank Inc.
Environmental Working Group
AIDS Treatment Activists Coalition
St. Vincent DePaul Society, Dayton District Council
Coalition of Citizens With Disabilities in Illinois
The Christian Community Action Coalition – Addictions Outreach Ministry Inc.
Northwestern Housing Enterprises, Inc.
American Civil Liberties Union
Welfare Law Center
North Carolina Community Action Association
South Westerly Tenants Organization
P.A.L. Mission
Community Development Law Center
AIDS Alliance for Children, Youth and Families
Neighborhood Housing Services of Asheville, NC, Inc.
National Community Capital Association
Cleveland Diocesan Social Action Office
Chenango Housing Improvement Program, Inc.
The Other Place
Environmental Health Watch
Mississippi Center for Justice
The Brady Campaign to Prevent Gun Violence United with the Million Mom March
Latino Commission on AIDS, New York, NY
Unitarian Universalist Service Committee
Delaware Valley The I Am Your Child Foundation
Women Employed, Chicago, IL
Housing Rights, Inc.
Just Harvest, A Center for Action Against Hunger, Pittsburgh, PA
Institute for Policy Studies, Paths for the 21st Century Project

cc: Office of General Counsel
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Vice Chair Ellen L. Weintraub
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner
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American Federation of Labor and Congress of Industrial Organizations

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February 4, 2004

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Mr. Norton:

This letter provides comments on the General Counsel's proposed draft of Advisory Opinion 2003-37. These comments are submitted by (1) the American Federation of Labor and Congress of Industrial Organizations, on its own behalf and that of its 64 national and international union affiliates representing 13 million working men and women in innumerable occupations throughout the United States, (2) a representative group of those affiliates, and (3) the unaffiliated National Education Association, which represents an additional 2.7 million people principally working in the public education field. All of these organizations are tax-exempt under Section 501(c)(5) of the Internal Revenue Code; most sponsor one or more federal political committees registered with and reporting to the Commission pursuant to Sections 433 and 434 of the Federal Election Campaign Act; and most sponsor one or more non-federal separate segregated funds registered with and reporting to the Internal Revenue Service pursuant to Section 527 of the Internal Revenue Code. In this regard they undertake political communications and activities in a manner similar to most national and international labor organizations.

The undersigned labor organizations focus these comments on aspects of the OGC draft that, if they were law, would affect their ability to carry out and finance vital public advocacy and other activities. Specifically, we are principally concerned about and oppose a central feature of the draft: the conclusion that the term "expenditure" defined at Section 431(9) of the Act includes public communications that "promote, support, attack or oppose" a clearly identified candidate for public office, so requiring a Section 527 political entity comprised of federal and non-federal accounts finance that speech exclusively with federal funds. Because

labor organizations are prohibited from financing "expenditures" under Section 441b(b) of the Act, the effect of the proposed redefinition of "expenditure" would be to require unions to finance such candidate-referential messages with their sponsored federal separate segregated funds, rather than with their regular treasury accounts or their non-federal separate segregated funds. We submit that - - leaving aside the grave constitutional implications of such a rule - - only Congress, and not the Commission, could have the authority to adopt this definition.

At the outset, we note that each of the undersigned labor organizations, and virtually every other labor organizations, regularly engages in costly and extensive efforts to influence the public debate, legislation and government policy by communicating with the public at large, officeholders and public officials. These communications, including through mass communications by broadcast and print, leaflets, rallies, letters, the Internet and other means, routinely refer to and characterize the actions of federal officeholders, virtually all of whom are "candidates" at all times under FECA § 431(2), often including the President, Vice President and Senators who will not even be on the ballot during the election cycle when the communications are disseminated, as well as non-incumbent candidates who are promoting or opposing public policies of concern to the labor movement.

The standard for whether union (and corporate) payments for communications to the public are "expenditures" within the meaning of the Act has always been and remains whether those communications "expressly advocate" the election or defeat of a clearly identified federal candidate. The OGC draft's contrary position constitutes a fundamental misreading of both the Act and the Supreme Court's recent decision in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003).

Section 431(9) of the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." *See also* 11 C.F.R. Part 100, Subpart D. For many years, the Supreme Court has construed this term to encompass only those communications that "'in express terms advocate the election or defeat of a clearly identified federal candidate,'" *McConnell*, 124 S. Ct. at 647, quoting *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986), the Court specifically so construed the phrase "expenditures...in connection with a federal election" in Section 441b, which defined which communications unions and corporations were proscribed from undertaking. The Court reaffirmed that construction in *McConnell*, 124 S. Ct. at 688 n. 76.

The enactment of the Bipartisan Campaign Reform Act amendments to FECA did nothing to change the statutory definition of "expenditure." To the contrary, the legislative history of BCRA reveals that Congress considered and then rejected expanding the definition of "expenditure" as a legislative approach to union and corporate non-express advocacy communications that some perceived as influencing federal elections. Instead, Congress left Section 431(9) and the operative language of Section 441b intact, and instead added "electioneering communications" to the proscriptions of union and corporate spending in Section 441b(b)(2), carving out a specific and limited new area of proscribed public communications in

Section 434(f)(3). See Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

The OGC draft purports to find authority for its proposed expansion of the definition of "expenditure" in the *McConnell* decision. However, *McConnell* neither addressed nor suggested any modification of the FECA definition of "expenditure" or any new restriction on communications by unions, corporations, unincorporated associations, non-federal Section 527 political organizations, or non-party, non-candidate political committees, other than the only new restriction before it, namely, the ban on "electioneering communications" by unions and corporations. Indeed, in upholding that provision, the Court rejected plaintiffs' under-inclusiveness argument even though the proscription did not apply to "print media or the Internet," pointing out that the definition also leaves all "advertising 61 days in advance of an election entirely unregulated." *Id.* at 697. More generally, the Court repeated its observation in *Buckley* that "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.*, quoting *Buckley*, 424 U.S. at 105.

The *McConnell* majority did conclude that its previously adopted "express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* at 688 (footnote omitted). But the Court made absolutely clear that its approval of the new ban on electioneering communications did not change that longstanding limiting construction of the unamended statute otherwise:

> Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law. . . . Section 203 of BCRA amends [§ 441b(b)(2)] to extend this rule, *which previously applied only to express advocacy*, to all "electioneering communications" covered by the definition of that term in amended FECA §[441b(b)(b)(2)].

Id. at 694 (emphasis added). Accordingly, the Commission lacks authority, in either an advisory opinion or even a regulation, to define "expenditure" more broadly than has Congress or otherwise to expand the scope of public communications that cannot be financed by a union, corporation or a non-federal Section 527 separate segregated fund or non-connected political organization.

The absurd and extreme consequences of the proposed adoption of the "promote, support, attack and oppose" formulation in this context may be easily understood. Only a federal political committee would be permitted to pay for a public communication that expressed an opinion about the conduct of a federal officeholder or other candidate, regardless of the timing, means or audience. Examples of implicated speech include, to take a few recent instances, a discussion of Members of Congress' conduct in leading the legislative effort to enact a Medicare prescription drug benefit, and a federal employee union criticizing Bush Administration personnel initiatives. It would be difficult to construct a more sweeping assault on the exercise of First Amendment rights, and most certainly it is neither commanded nor authorized by FECA, as amended.

Nor could the Commission adopt such a definition by purporting to confine it to Section 527 political organizations. For, the scope of the term "expenditure" in the Act has always applied universally and in the same manner to any entity that is not a federal political committee. And, as *McConnell* reconfirmed, it has been a bedrock principle of federal election and tax law that the only public communications subject to mandatory financing through a political committee is express advocacy, a principle adjusted by BCRA, as just discussed, only by extending that funding requirement to "electioneering communications."

Not only is the proposed definition inconsistent with the statutory and regulatory definitions of "expenditure," it is also inconsistent with and takes no heed of the Commission's own longstanding regulations governing the use of union and corporate treasury funds for communications to the general public at 11 CFR 114.4, regulations that the Commission retained virtually intact in the aftermath of BCRA. Section 114.4 plainly permits unions and corporations to make communications to the general public that may be election-related provided that those communications do not expressly advocate the election or defeat of a federal candidate and are not coordinated with any candidate or political party committee in, for example, making registration and get-out-the vote communications and distributing voting records and voter guides. See 11 C.F.R. § 114.4(c).

Moreover, the proposed definition also would conflict with the Internal Revenue Code principles governing public communications by Section 501(c) organizations such as unions and could jeopardize the tax status of unions' and other organizations' separate segregated funds. In Revenue Ruling 2004-6, the IRS set forth rules governing when a public advocacy communication that names a public official, including federal officeholders who may be candidates, will constitute a taxable "exempt function" expenditure within the meaning of Section 527. Section 527(e)(2) defines an "exempt function" as "influencing or attempting to influence the ...nomination or election...of any individual to any Federal, State, or local political office...." A nonprofit organization that makes an "exempt function" expenditure from its general funds is subject to tax on the lesser of its investment income or the amount of its exempt function expenditures at the highest corporate rate. See Section 527(f)(1). However, if a nonprofit organization establishes a separate segregated fund to make its exempt function expenditures, only that fund will be subject to tax.

In Revenue Ruling 2004-6, the IRS described six factors that tend to show that a public communication will be treated as an "exempt function" expenditure absent express advocacy of the election or defeat of a candidate. Payments for a communication will be treated as "exempt function" expenditures if it: a) identifies a candidate for public office; b) the timing coincides with an electoral campaign; c) the communication targets voters in a particular election; d) the communication identifies the candidate's position on the public policy issue that is the subject of the communication; (e) the position of the candidate has been raised as distinguishing that candidate from others in the campaign either in that communication or in other public

communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Conversely, the IRS described five factors that tend to show that a communication on a public policy issue is not for an "exempt function": a) any one or more factors outlined in a-f above is absent; b) the communication identifies specific legislation or a specific event outside the control of the organization that it seeks to influence; c) the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action; d) the communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event; and e) the communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

Unlike the crude and sweeping "promote, support, attack or oppose" standard proposed in the OGC draft, the IRS standard - - whatever its merits as an application of the Internal Revenue Code, a matter that is unnecessary to address in the context of the Commission's review of the OGC draft - - for "exempt function" expenditures recognizes that there is a category of public communications that may both name and express opinions concerning candidates that are legislative or policy-oriented and not electoral and so both may not be taxed as "exempt function" disbursements if undertaken by a Section 501(c) organization with its regular treasury account, and would not be expenditures appropriate a Section 527 organization. Section 438(f) of FECA requires the Commission to "consult and work together [with the IRS] to promulgate rules [and] regulations that are mutually consistent;" certainly no advisory opinion should be adopted that creates such conflicts and disharmonies between the two regulatory regimes, especially in the wake of congressional amendments to FECA that included specific references to non-federal Section 527 political organizations but did *not* subject them to any new constraints as the OGC draft proposes. See 2 U.S.C. §§ 441b(b)(2) and 441i(d)(2). Moreover, in adding the "electioneering communications" provisions to FECA, Congress specifically provided, at Section 434(f)(7), that in doing so it could not be "construed to establish, modify or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986."

In responding to Question 24, the OGC draft states that foreign nationals may not contribute to the non-federal accounts of a federal political committee such as ABC. Unfortunately, however, the draft appears to go much further and suggest that foreign nationals may not contribute to any organizations, including labor organizations that engage in any activities in connection with federal, state or local elections. Not only is this broad language unnecessary in responding to the ABC request, it would, if adopted by the Commission, create significant problems for labor unions and other Section 501(c) organizations. For example, many unions have some dues-paying members who are foreign nationals working in the United States. Unions regularly engage in voter registration and GOTV activities among their members. Although these activities normally represent only a small fraction of a union's total budget, they

are virtually important activities. Unions also fund from their dues income nonpartisan GOTV and voter registration activities aimed at the general public, and contribute to other organizations that do so. FECA and the Commission's regulations specifically permit such expenditures by unions.

Congress could not have intended that the ban on foreign nationals making contributions, donations and expenditures in elections extend to union member dues. Such an interpretation would require unions, some with over a million members, to screen all of their dues payments to determine if any of them came from foreign nationals if they wanted to engage in these types of traditional activities. This aspect of the OGC draft should removed or at least highly qualified so as to permit further and more specific consideration of this issue.

Although it is not relevant to the questions posed in the advisory opinion request, the OGC opinion also states categorically that contributions from foreign nationals cannot be used in connection with ballot initiatives. The provision banning foreign national contributions, 2 U.S.C. §441e, before BCRA provided that the ban applied only to contributions "in connection with an election for any political *office*." (Emphasis added.) BCRA amended and rewrote that provision. 2 U.S.C. §441e now provides that the ban applies to "Federal, State and local elections." Although this represented a language change, there is no evidence that Congress intended BCRA to extend that ban beyond elections for public office. At the time that BCRA was enacted, the Commission had taken the position that contributions and expenditures relating only and exclusively to ballot initiatives, and not to elections to any political office, did not fall within the purview of the Act. See AO 1989-32, AO 1984-62, fn.2, and AO 1980-95. And, 11 C.F.R. 100.2 defines "election" as an election to Federal "office." Thus, when Congress used the word "election" in amending 2 U.S.C. §441e, it meant an election to public office, not a ballot initiative. Although there may be situations where ballot initiatives are so closely linked with federal candidates or federal elections that they fall within the Commission's regulatory authority, see AO 1989-32 and AO 2003-12, it is not reasonable to believe that Congress intended that BCRA's amendment to 2 U.S.C. §441e was intended to extend the Commission's jurisdiction to ballot initiatives that had no such relationship to federal elections or candidates and that previously had been understood to fall beyond the Commission's jurisdiction. As with the discussion above concerning the statutory term "expenditure," if Congress had intended such a significant expansion of the Commission's jurisdiction, it would have done so explicitly.

We appreciate the opportunity to provide these comments and respectfully request that, in light of the importance of this matter, if the Commission circulates a revised draft, that it provide an opportunity for further public comment on it.

Yours truly,

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AFL-CIO

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February 4, 2004

Commission Secretary
Federal Election Commission
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Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

INDEPENDENT SECTOR, a coalition of nearly 700 charitable nonprofit organizations, philanthropic foundations, and corporate giving programs, is writing to express our strong concern regarding the scope and implications of the General Counsel's draft Advisory Opinion 2003-37 prepared in response to a request by Americans for a Better Country ("ABC").

The majority of our members are organized as nonprofit corporations under state law and are exempt from federal income taxation under sections 501(c)(3) of the Internal Revenue Code. Most are actively engaged in educating the public and advocating positions on legislative and policy issues related to their charitable missions, often referencing current elected federal officeholders who have supported or opposed those positions – activities that the Commission noted in its October 23, 2002 rules on "electioneering communications" are considered by the public to be "highly desirable and beneficial."

Although this advisory opinion is given in response to a request from a political committee, many of the activities that the opinion would treat as expenditures under the Act seem strikingly similar to activities of 501(c)(3) and 501(c)(4) organizations that had not been previously treated as expenditures, including activities more appropriately characterized as lobbying or fundraising or nonpartisan voter activation. In its attempts to regulate these activities of political committees, it is critical and essential that the Commission clarify this will not apply to legitimate, nonpartisan activities by 501(c) organizations.

Effective advocacy work generally requires references to the elected officials who have sponsored or led efforts to support or oppose particular legislation, yet this opinion appears to define any communication that includes criticism or praise of an elected federal official who is running for re-election as an expenditure that is subject to FECA rules.

As the Commission recognized in its BCRA rulemaking [add citation to 501(c)(3) exemption from electioneering communications provisions], federal tax law requires that 501(c)(3) organizations refrain from any indication of support or opposition for candidates, and thus any ruling that legitimate 501(c)(3) activities might also be an expenditures under the Act would create

enormous complications for charitable organizations seeking to comply with both tax and election laws.

We share the concerns expressed in comments submitted by a coalition of nonprofit organizations including the Alliance for Justice, Leadership Conference on Civil Rights, League of Conservation Voters, NAACP, NARAL Pro-Choice America, People for the American Way, Planned Parenthood Federation of America, and Sierra Club. We are particularly troubled by the suggested restrictions on voter registration efforts and fundraising communications, and the implied prohibition on contributions by foreign nationals to any nonprofit organizations engaged in voter registration, get-out-the-vote and other activities in connection with a federal, state, or local election for public office. These nonpartisan activities are vital to increasing civic participation by all citizens. Given the disturbingly low levels of participation by qualified citizens in the elections, encouraging greater participation is an important responsibility of our voluntary organizations.

For all of these reasons, we strongly urge the Commission not to issue the draft opinion in its present form. Please feel free to contact me or our Vice President for Public Affairs, Patricia Read, if you have questions or would like further information.

Respectfully submitted,

Diana Aviv

Diana Aviv
President
INDEPENDENT SECTOR

cc: Commissioner Ellen L. Weintraub
Commissioner Bradley A. Smith
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner